(24,354.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 235.

THE HUTCHINSON ICE CREAM COMPANY AND C. J. HUTCHINSON, MANAGER, PLAINTIFFS IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1915.

1 In the Supreme Court of the United States of America.

29785.

STATE OF IOWA, Appellee,
v.
HUTCHINSON ICE CREAM CO. and C. J. HUTCHINSON, Manager, Appellants.

Appeal from the Supreme Court of the State of Iowa.

This cause having been presented on Motion to advance on January 23rd, 1914, is ordered advanced and that the same be presented at the April period of this Term of said Court.

And on April 9th, 1914, this cause is submitted together with No. 29,785, (State of Iowa, Appellant, v. Sanders Ice Cream Co., and L. R. Sanders, Manager,) on abstracts and arguments on file and oral arguments of counsel for both sides. And on May 12th, 1914, the Court filed their written opinion reversing and remanding the judgment of the District Court, a copy of which is hereto attached.

2 *Transcript.*

In the Supreme Court of Iowa.

29785.

STATE OF IOWA, Appellant,
v.
HUTCHINSON ICE CREAM CO. and C. J. HUTCHINSON, Manager, Appellees.

George Cosson, Attorney General.
John Fletcher, Ass't Att'y Gen.
Hager & Parrish.

Appealed from Polk District Court.

Papers Filed by Appellant.

1914.
Jan. 12. Abst.
Jan. 12. Motion to Advance (sustained).
Jan. 20. Reply to Resistance.
Mar. 2. Argument.
Mar. 24. Notice of Oral Argument by both sides.
Mar. 25. Exhibits.
Apr. 4. Argument.
Apr. 8. Reply.
Apr. 9. Reply.

Papers Filed by Appellee.

1914.
Jan. 19. Resistance to Motion to Advance.
Mar. 25. Argument.
Apr. 3. Argument.

On Rehearing.

June 2nd, 1914. Notice of Rehearing.
July 14, 1914. Waiver of Rehearing.
Opinion filed May 12th, 1914.
Disposition of: Reversed and remanded.

3 Filed Jan. 12, 1914. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of Iowa, January Term, 1914.

STATE OF IOWA, Appellant,
vs.
HUTCHINSON ICE CREAM COMPANY, and C. J. HUTCHINSON, Manager, Appellees.

Criminal.

Appeal from Polk District Court.

Hon. W. H. McHenry, Judge.

Thos. J. Guthrie, County Attorney, and George A. Wilson, Assistant County Attorney, Attorneys for Appellant.
Hager & Parrish, Attorneys for Appellee.

Appellant's Abstract.

Due, timely and legal service of the within abstract is accepted this — day of January, 1914.

—— ——,
—— ——,
Attorneys for Appellees.

4 On the 29th day of July, 1913, there was filed in the office of John T. Conroy, Justice of the Peace in and for Des Moines Township, an information entitled the State of Iowa vs. Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, the same being as follows:

Defendants are accused of the crime of selling, exchanging, delivering and having in possession with intent to sell, exchange and expose and offer for sale and exchange adulterated food, in violation of Chapter One Hundred and Sixty-six (166), laws of the Thirty-first General Assembly, as amended; Supplement to the Code, Section 4999-a15 to 4999-a43.

For that defendants did on or about the 21st day of July, A. D. 1913, in the Town of Des Moines, County of Polk and State of Iowa, have in possession with intent to sell, exchange and expose, and offer for sale and exchange, and did sell, exchange and deliver to one P. W. Crowley, a certain food product called "Ice Cream" which was adulterated in that it did not conform to the standards established by law, being deficient in butter fat.

The same being adulterated contrary to the statute in such cases made and provided and against the peace and dignity of the State of Iowa.

(Signed) W. B. BARNEY,
State Food and Dairy Commissioner.

5 Thereafter the defendant filed a

Demurrer,

the same being as follows:

Come defendants and demur to the information herein because:

First. The acts charged as constituting the offense charged, constitute no crime under the statutes upon which the prosecution is based, i. e., Chapter 166, Laws of the Thirty-first General Assembly, Sec. 4999-a15 to 4999-a43.

Second. If the prosecution is claimed to be based in any respect upon the provisions of Chapter 175, Acts of the Thirty-fourth General Assembly, said act of the Thirty-fourth General Assembly is unconstitutional and void in view of Sec. 29, Article 3, of the Constitution of Iowa, which provides that every act shall embrace but one subject which shall be expressed in its title, moreover said act provides no penalty and being a separate act is not included within the prohibition of Sec. 4999-a15-a43 Supplement to Code.

Third. The legislature had no power to fix the standard of butter fat in ice cream at 12 per cent because:

a. Said standard and the statute fixing the same are unreasonable.

b. It invades the individual rights of defendant and is not a mere police regulation having no relation in fact to the comfort, safety and welfare of the public.

6 *c.* Said statute is in violation of Sec. —, Article — of the Constitution of the State of Iowa, in that it arbitrarily interferes with personal liberal and private property without due process of law, having in fact no relation to the public health, comfort or welfare.

d. That said statute is in violation of Section 1, Fourteenth Amendment to the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law having in fact no relation to the public health, comfort or welfare.

(Signed) HAGER & PARRISH,
Attorneys for Defendant.

And on the 16th day of September, 1913, the said John T. Conroy, Justice of the Peace, overruled said demurrer and thereafter upon a hearing of the evidence in said case, defendants having entered a plea of not guilty, the court after hearing all the evidence offered and introduced found the defendant- guilty, and they were thereupon assessed a fine in the sum of $50.00, and judgment was entered for that amount.

Thereafter, to-wit: on the 16th day of September, 1913, the defendant filed its Notice of Appeal to the District Court of Polk County, Iowa.

That thereafter, to-wit: December 18, 1913, said cause coming on for hearing in the district court, the defendants' demurrer
7 being again interposed was thereupon argued to the court, the Honorable W. H. McHenry, Judge, presiding.

And on the 19th day of December, 1913, said court sustained said demurrer and filed with the clerk of the District Court of Polk County, Iowa, the following

Ruling and Judgment.

The defendants are accused in two separate informations of exchanging, delivering and having in possession with intent to sell, exchange, expose and offer for sale, adulterated food in violation of Chapter 166 of the Laws of the Thirty-first General Assembly as amended, for that the defendants did on or about the 21st day of July, 1913, at the Town of Des Moines, Polk county, Iowa, have in their possession with intent to sell, exchange and expose and offer for sale and exchange a certain food product called ice cream which was adulterated in that it did not conform to the standard established by law, being deficient in butter fat.

The statutes of this state are Supplement to the Code, Section 4999-a-22, Subdivision 4, defining adulteration of food which provides that any food that does not conform to the standing established by law is adulterated food. And Section 4999-a-20 of the Supplement to the Code, which provides a penalty for selling a food product which does not conform to the said standard established by law, and Chapter 175 of the Thirty-fourth General Assembly which is an act to amend Section 4999 of the code relating to food standards by which it is enacted as follows: "Section I. Ice cream is
8 the frozen product made from pure, wholesome sweet cream and sugar with or without flavoring, and if desired the addition of not to exceed 1 per cent by weight of a harmless thickener, and contains not less than 12 per cent by weight of milk fat and the acidity shall not exceed three-tenths of 1 per cent."

The defendants have demurred to these informations upon the ground that the act is unconstitutional for the reason that but one subject shall be expressed in the title of an act, and that the title of the act in question does not express the purpose of this amendment. Also that the legislature has no power to fix the standard of butter fat in ice cream at 12 per cent; because the standard is unreasonable, and because it invades the individual right of the defendant, and is

not a police regulation, having no relation in fact to the comfort, health or welfare of the public. And further because the statute is in violation of Sections 1 and 9 of Article I of the Constitution of the State of Iowa in that it arbitrarily interferes with personal liberty and private property without due process of law. And further that the statute is in violation of Section 1 of the 14th Amendment of the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law, having in fact no relation whatever to public health, comfort, morals or safety.

This question presented in this manner requires of this court to determine the constitutionality of this law. Realizing that it is not the province of the court to declare an act of the legislature unconstitutional upon any trifling ground, or upon mere prejudice
9 or feeling; that the court should not declare an act unconstitutional unless the act violates the fundamental law beyond any reasonable doubt, this court hesitates to act upon this question without expressing the reasons for such action.

Both the Constitution of the United States and of the State of Iowa, provide that "No man shall be deprived of his liberty without due process of law." The meaning of the term liberty has been construed by many of the courts to mean the highest degree of freedom of individual action consistent with public welfare and the legal rights of other individuals. The police power of the state is sufficient to authorize the control of any citizen in his property rights, his contractual relations and his private conduct if they are enacted for, and applicable to, the public welfare, health, morals or comfort. The right to establish and conduct an ordinary and legitimate business, and to enter into contracts and to pursue a calling cannot be interfered with unless there is a tendency to injure public health, comfort or morals. And so long as the legislative power is exercised for the furtherance of these principles of government it cannot be interfered with by the court. But whenever the legislature, under the pretense of regulating the public health, comfort or morals; in other words, under the pretended exercise of the police power of the state, attempts to control and regulate the citizen in the exercise of his natural and legal rights when such control has no relation whatever to public health, comfort or morals, the actions of the legislature are void and of no effect, because they are in conflict with the fundamental law of the land. I do not need to cite authorities to
10 establish these principles which are so well established and so firmly rooted in the jurisprudence of the nation that they need no further citation. The question then is as follows: Can the legislature of the State of Iowa prescribe by law that the manufactured products known to the public as ice cream shall contain 12 per cent by weight of butter fat? In construing all these statutes it is the duty of the court to take into consideration by the process known as judicial notice all those matters and things which are of common knowledge and understanding.

Butter fat is the natural product which is extracted from cream or milk and as a food product is generally known and recognized

as a harmless food product and suitable for the maintenance and support of the physical bodies of men. Yet it is equally well known and commonly understood that a food product without butter fat may be equally harmless or equally beneficial. Ice cream is not a natural food product, but a manufactured combination of other ingredients. To one man ice cream containing 12 per cent of butter fat might be beneficial and acceptable to his taste. To another man ice cream containing but 6 per cent of butter fat might be more suitable, and in both cases it is a matter of common knowledge that it is a harmless food product not injurious to public health, morals and welfare. The State of Iowa might as well have said in defining ice cream that it shall have 10 per cent by actual weight of sugar. The facts upon which this law is founded are simply arbitrary, and the presence of 12 per cent of butter fat in ice cream has no relation whatever, and cannot possibly have any relation to public health, morals or welfare.

11 If the legislature of the State of Iowa can say to the manufacturer you cannot sell ice cream within the State of Iowa, unless it contains 12 per cent of butter fat, the same prohibition extends to the consumer and prevents him from buying and consuming ice cream with a less percentage than 12 of butter fat. The law not only interferes with the liberty of the manufacturer, but interferes with the liberty of the consumer who may, by reason of his personal taste and desires, prefer ice cream of a lower percentage of butter fat.

While there has never been a decision of any of the courts that I have been able to find determining these propositions of law as applied to ice cream, yet they have been repeatedly announced by the highest courts of the land. And if the State of Iowa through its legislature has prescribed the ingredients of pure food which will remain pure food with or without the ingredients prescribed by statute and harmless to public health, morals or comfort with or without the prescribed ingredients they have invaded the personal liberty of the citizen and their action is void. If the legislature of Iowa can prescribe that ice cream shall contain 12 per cent of butter fat and prevent the sale of it without that ingredient they may equally provide that no baker shall sell cake unless it contains 20 per cent by actual weight of pure eggs to the pound of cake. They may also provide that no hotel keeper shall serve soup to his customers without 6 per cent of animal fat therein, and both the manufacturer and the purchaser would be bound by this act of the legislative body.

12 A further discussion of this question which is so plainly and unequivocally beyond the power of the legislative body would be useless.

The conclusion of the court is that the statute in question is unconstitutional because it violates both the Constitution of the State of Iowa and the United States of America.

The demurrer in each case is therefore sustained and defendants ordered discharged and their bonds released.

And thereafter and on the 18th day of December, 1913, the following was entered of record:

Judgment.

Now on this day, this case comes on for hearing upon the demurrer of defendant to the information filed in said cause, the State of Iowa appearing by Thos. J. Guthrie, County Attorney, and the court after being fully advised in the premises sustains said demurrer, and plaintiff excepts.

It is therefore ordered and adjudged by the court that this cause be and the same is hereby dismissed, the defendant discharged and bond released.

(Signed) W. H. McHENRY, *Judge.*
December 18, 1913.

And thereupon the plaintiff, the State of Iowa, served upon Hager & Parrish, attorneys for the defendant, and Joseph P. Maher, Clerk of the District Court of Polk County, Iowa, its

13 & 14 *Notice of Appeal.*

On the 22d day of December, 1913, the appellant perfected its appeal to the Supreme Court of the State of Iowa by serving the same on Hager & Parrish, the attorneys for the defendants, and on Joseph P. Maher, Clerk of the District Court of Polk County, Iowa, appealing from the ruling on the demurrer, and filing the said notice of appeal with the said clerk, and securing to the said clerk his fees for a transcript of the proceedings.

Certificate of Attorneys.

The above and foregoing abstract of record in the above entitled cause contains all the records therein, pleadings and evidence introduced on the trial, rulings of the court, and all proceedings had and done in said case, and are as full, true and complete as the same are on file in the record of the clerk of the District Court of Polk County, Iowa.

THOS. J. GUTHRIE,
County Attorney, and
GEORGE A. WILSON,
Ass't County Attorney,
Attorneys for Appellant.

15 In the Supreme Court of Iowa.

Filed May 12, 1914.

(Full Bench Case.)

29784—29785.

STATE OF IOWA, Appellant,
vs.
HUTCHINSON ICE CREAM COMPANY, and C. J. HUTCHINSON, Manager, Appellees, and Another Case.

Appeal from Polk District Court.

Hon. W. H. McHenry, Judge.

Two informations were filed by a State Food and Dairy Commissioner before a Justice of the Peace in two cases, one against the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, and the other against the Sanders Ice Cream Company and E. R. Sanders, President.

The defendants were accused of the crime of selling, exchanging, delivering, and having in possession with intent to sell, exchange and expose and offer for sale and exchange, adulterated food, in violation of Chapter 166, Laws of the 31st G. A., as amended; Supp. to the Code, Sec. 4999-a15 to 4999-a43, for that the defendants did have in possession, with intent to sell, exchange and expose and offer for sale and exchange and did sell, exchange and deliver a certain food product called ice cream, which was adulterated, in that it did not conform to the standards established by law, being deficient in butter fat, etc.

Demurrers were interposed by the defendants on the following grounds:

First. The acts charged as constituting the offense charged, constitute no crime under the statutes upon which the prosecution is based, i. e., Chapter 166, Laws of the Thirty-first General Assembly, Sec. 4999-a15 to 4999-a43.

Second. If the prosecution is claimed to be based in any
16 respect upon the provisions of Chapter 175, Acts of the Thirty-fourth General Assembly, said act of the Thirty-fourth General Assembly is unconstitutional and void in view of Sec. 29, Article 3, of the Constitution of Iowa, which provides that every act shall embrace but one subject which shall be expressed in its title, moreover said act provides no penalty and being a separate act is not included within the prohibition of Sec. 4999-a15-a43 Supplement to Code.

Third. The legislature had no power to fix the standard of butter fat in ice cream at 12 per cent because:

a. Said standard and the statute fixing the same are unreasonable.

b. It invades the individual rights of defendant and is not a mere police regulation having no relation in fact to the comfort, safety and welfare of the public.

c. Said statute is in violation of Sec. — Article — of the constitution of the State of Iowa, in that it arbitrarily interferes with personal liberty and private property without due process of law, having in fact no relation to the public health, comfort or welfare.

d. That said statute is in violation of Section 1, Fourteenth Amendment to the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law having in fact no relation to the public health, comfort or welfare.

The demurrers were overruled by the Justice, evidence was taken, and the defendants were found guilty. An appeal was taken to the District Court, where the demurrers were again interposed and sustained. The State appeals. The cases are submitted together. Reversed.

Geo. Cosson, Attorney GeGneral; John Fletcher, Asst.
17 Atty. Gen.; O. S. Thomas, Special Counsel; Thomas J. Guthrie, County Atty., and George A. Wilson, Assistant County Atty., for the Appellant.

Hager & Parrish and Walter Jeffreys Carlin for Appellees.

PRESTON, *J.*:

1. One of the objections to the statute on which this prosecution is based is that the act is invalid for non-compliance with Sec. 29, Article 3, of the Constitution of Iowa, in that its subject was not expressed in the title. This constitutional provision, or that part of it relating to the points raised in this case, is that, "Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title."

Chapter 166, Acts of the 31st G. A. (Code Supp. Sec. 4999-a15 to a30) was an act to prevent the adulteration of foods, etc. This was amended by Chapter 178, Acts of the 32nd G. A., by adding at the end of Chapter 166, as Section 18, and now appearing as 4999-a31 of the Supplement to the Code, relating to food standards, and establishes standards for certain articles therein enumerated.

That section (4999-a31) was amended by Chapter 175 of the 34th Session of the Legislature, the act in question, and fixes a standard for ice cream in addition to the other articles for which the standard had been fixed in 4999-a31. The title to Chapter 175, just referred to, is,

"An Act to amend section four thousand nine hundred and ninety-nine-*athirty*-one (4999-31) of the supplement to the code, 1907, relating to food standards."

The provisions of the act establishing an ice cream standard, after the enacting clause, are:

"1. Ice-cream. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring,
18 and if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener, and contains not

less than twelve per cent. (12%) by weight of milk fat, and the acidity shall not exceed three-tenths (3-10) of one per cent. (1%).

"2. Fruit ice-cream. Fruit ice-cream is the frozen product made from pure wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener and contains not less than ten per cent. (10%) by weight of milk fat.

"3. Nut ice-cream. Nut ice-cream is the frozen product made from pure wholesome, sweet cream, sugar, and sound, non-rancid, nuts, and, if desired, the addition of not to exceed one per cent (1%) by weight of harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat."

Some of the other provisions of these statutes, which have some bearing upon the points argued will be here referred to. Section 4999-a20 provides in part that:

"No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant, or agent of any other person, firm or corporation, shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Section 4999-a21 provides in part:

"The word 'food,' as herein used, shall include all articles used for food, drink, confectionery or condiment, * * * by man or domestic animals, whether simple, mixed or compound."

19 Section 4999-a22 defines adulteration and states in part that:

"For the purpose of this act an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

The purpose of the constitutional provision contained in Sec. 29, Art. 3, was, as stated in some of the cases, to prohibit the insertion in an action, of incongruous matter having no connection or relation with the general subject as expressed in the title. It has been held that the title is sufficient, although confined to general terms, if it answers as a key to the subject matter of the act.

Sisson vs. Board, 128 Iowa, 442, 452.
State vs. Fairmont Creamery Co., 153 Iowa, 702, 715.

It is not necessary that the details of the subject matter, or reasons which brought about the enactment by the Legislature should be

set out in the title. If it refers in a general way to the subject and is reasonably germane, and calculated to advise the members of the Legislature, and the people, of the nature of the pending legislation, or changes in the laws by amendment, it is sufficient. The requirement that the act shall embrace but one subject, and matters properly connected therewith, was intended to prevent the evils
20 of omnibus bills and surreptitious legislation. It is not claimed in this case that the act in question does contain more than one subject, but that the subject is not expressed in the title. This, of course, must be done, under the terms of the provision, at least to the extent already indicated. The authorities seem to agree that such provisions are to be given a reasonable construction. As some of them state it, they should be construed liberally to uphold proper legislation, all parts of which are reasonably germane, on the one hand, and to prevent trickery on the other.

Appellees rely on State vs. Bristow, 131 Iowa 664. In the Fairmont Creamery case, supra, it was shown that in the Bristow case there was nothing in the title to indicate the contents of the act; that the title related only to the act which was repealed, and did not refer to the act which was a substitute for the act which was repealed. Sec. 4999-a31 established standards of more than twenty articles. The essential subject was food standards. The act in question is amendatory to Sec. 4999-a31, and the title recites that it is "An Act relating to food standards."

The act in question adds ice cream to the list for which standards had already been established. In our opinion, it was germane, and the act does not offend against the constitutional provision quoted. The point is ruled by the holding in McGuire vs. Railway, 131 Iowa, 340, 346, and the Fairmont Creamery Company case, supra. See also:

Santo vs. State, 2 Iowa 165.
State vs. County Judge, 2 Iowa, 280.
Morford vs. Unger, 8 Iowa, 2.
Davis vs. Woolnough, 9 Iowa 104.
21 Porter vs. Thomas, 22 Iowa, 391.
Martin vs. Blattner, 68 Iowa, 286.
Christie vs. Ins. Co., 82 Iowa, 360.
Iowa Association vs. Selby, 111 Iowa 402.

2. The principal point in the case is, whether the act in question, fixing a standard for ice cream, is within the police power of the State. The contention of defendants, as they state it, is substantially, that the act is not within the police powers of the State, for that it in fact has no relation to the comfort, health and welfare of the public, and hence violates both the State and Federal Constitution by interfering with the personal liberty and private property of the citizens, without due process of law; that it is arbitrary, unreasonable and an unwarranted interference with a lawful business, depriving manufacturers of ice cream of property rights of great value, and depriving both manufacturers of ice cream and the people of their liberty.

The contention of the State is, in substance, that the act is clearly within the police power of the State, and hence does not offend against the Federal or State Constitution, unless it has no reasonable relation to the purposes which it is designed to effect. It is conceded by the State that, to be a valid exercise of such power, the act must have relation to the comfort safety or welfare of the public, but that the welfare of the public involves or includes the right of the legislature to protect the public from fraud and deception; that the Constitution does not secure to any one the privilege of defrauding the public; that it is impossible for consumers of ice cream to determine by any ordinary diligence the ingredients of the product, and that, without a standard, opportunity is afforded unscrupulous
22 manufacturers of ice cream to palm off upon the public a much cheaper and inferior article for a higher quality at the price of the better and most costly product.

There seems to be no serious controversy between counsel for either side, in regard to any of the fundamental propositions of law, involved, but they agree that the difficulty lies in their application. Defendants concede the validity of the police power in its fullest extent; admit that it is within the power of the Legislature to enact laws for the purpose of preventing fraud in the sale of food products; that ordinarily the propriety of passing an act of this character is a question for the determination of the Legislature; that there are many restraints to which every person is necessarily subject for the common good, and that laws enacted under the police power to promote such purpose may be sustained, although they interfere, to some extent, with the liberty of the citizen and the freedom of contract. On the other hand, it is conceded by the State that such laws, to be valid, and within the police power, must not be arbitrary or capricious, but reasonable and have a reasonable relation to the object to be accomplished.

Such concessions render it unneecssary for us to discuss at length some of the points, or to review the many cases cited. It is said by counsel for appellees that the only debatable ground in the case is, whether this statute comes within the police power as a measure tending to prevent the liability to fraud and deception; that this is the real question. The wisdom or expediency of such a measure is not for the determination of the court. The presumptions are in favor of the exercise of the power in the enactment. We are to overthrow the Act, if at all, only when it violates the Constitution "clearly, palpably, plainly and in such manner as to leave
23 no reasonable doubt." The question is, whether there is any reasonable ground upon which the Legislature, acting within its conceded powers, could pass such a law as that now in question. The courts have not attempted to accurately define the limit of the police power. (?) nor is it advisable to do so, because of changing conditions. The power is broad, but subordinate to the Constitution. The courts may and will interfere in a proper case where the Legislature has clearly exceeded the constitutional limitations. It is not enough that the case is a doubtful one. Though we might be of the opinion that an 8% or some other standard should

have been established, still we ought not to interfere with the standard fixed by the Legislature, unless such standard is clearly arbitrary and unreasonable. We shall not take the space to give definitions of police power. The question is discussed at length in the following, among other, of our own cases:

McGuire vs. Railway, 131 Iowa, 340, 354.
State vs. Schlenker, 112 Iowa 642.
State vs. Packing Co., 124 Iowa 323.

It is not claimed by either side, as we understand it, that the act in question is a health law. The claim of the State is, that the purpose of the Legislature was to prevent the perpetration of fraud upon the public. The public welfare embraces a variety of interest-calling for public care and control; these are: the primary social interests of safety, order and morals; economic interests, and non-material and political interests.

Freund Police Power, Secs. 9, 15.

The claim here is that the act fixing a standard for ice cream deals with economic interests, the purpose being, as already
24 stated, to prevent fraud. It was said in one of the milk cases, State vs. Schlenker, 112 Iowa 642;

"It is not enough to show that defendant did not intend to defraud, or that the milk he sold was wholesome. * * * It is enough that adulteration such as prescribed by the statute may defraud, or prove deleterious to the public health or comfort. The Legislature may well determine that the adulteration of milk tends to facilitate vicious practices and that it ought to be prohibited."

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have been frequently sustained in the courts.

McClain vs. Arkansas, 211 U. S. 539, 550.

The Constitution does not secure to any one the privilege of defrauding the public.

Plumloy vs. Mass., 155 U. S. 461, 479.

As bearing upon the question as to whether this statute, fixing a certain standard for ice cream, is so manifestly arbitrary and unreasonable as that the Legislature was not justified, under the police power, in enacting it, and whether fraud might have been practiced upon the public in the sale of ice cream, we should here refer to conditions and some of the facts which we ought to presume were known to the Legislature when the statute was enacted. We say this because some of the facts and conditions called to our attention existed and were of more or less notoriety at the time of the passage of this law. We are asked to consider these facts and conditions for the purpose of determining whether the act is so manifestly arbitrary and unreasonable as to require us to hold it invalid. If, under any possible state of facts, the act would be constitutional and
25 valid, the court is bound to presume that such conditions existed; whether a state of facts existed which called for the

enactment of this legislation was for the determination of the Legislature.

McGuire vs. Railway, supra.

An authority is cited to the effect that when a question of fact is debated, or debatable, and the extent to which a constitutional limiation goes is affected by the truth in respect to that fact, the court will take judicial cognizance of all matters of general knowledge, and will consider expressions of opinion from other than judicial sources given by those qualified by their skill and experience to express such opinions.

Muller vs. Oregon, 208 U. S., 412.

Just how far we should go in regard to such matters, where as in this case, the decision was on demurrer, we need not determine, for the reason that we are asked by both sides, without objection from either, to consider depositions taken for use, had the case been tried on the merits, reports, trade journals, cook books containing a great many formulas for making ice cream, circulars and the like. These have been abstracted and certified. We shall not attempt to set out all these matters, but enough to illustrate in a general way the points made.

It appears that in seventeen states the standard fixed for ice cream to be sold is 14%; five states have fixed the standard at 12% butter fat, the same as our own; but five states which have legislated have a lower standard than Iowa; the Federal Government fixes the standard for ice cream at 14%. It should be said as to the 14% standard fixed by the Federal Government that it is not claimed that such standard has been fixed by law, but by the United States Department of Agriculture. But, even though not law, it would
26 be a circumstance proper to be considered as the opinion of that department. The Legislature would not be bound entirely by the conflicting opinions of any of the persons we shall refer to. From these documents, it appears that there is a difference of opinion as to the advisability of establishing a standard for ice cream, or if it is established, the percent of butter fat the product should contain. Some think a high standard of butter fat is injurious to health, especially for children and invalids; others object to high butter fat contents during the summer months on account of the shortage in the supply. It is contended by some that ice cream should be made from cream, sugar and flavor solely. An article in a trade journal says:

"Commissioners have agitated a high butter fat standard and we have the significant controverting fact that nowhere is there a great ice cream business built up on a high butter fat formula. The ice cream manufacturers know what the public wants. It does not want an over rich product because it cannot eat enough of it."

The same article states:

"The moral support of the dairyman, the creamery men and the cheese manufacturer and the milk dealer in these matters will help greatly. They have only to remember that when the ice cream man cuts his butter fat content, he adds condensed — and that is about

as valuable as the other, i fanything condensed is more valuable because it allows the use of all the milk."

Large manufacturers of ice cream from different parts of the country gave testimony and gave their opinions from their stand-
point. They state that they would not attempt to define ice
27 cream because it covers a large number of frozen substances. That there is an unlimited number of formulas; cream should be a part of the mix, the same as sugar or flavor. When condensed milk is used the purpose is to add solids, thereby giving the cream better body; the purpose of the cream is to add to the flavor and to add to the body; the largest dealers in the United Stats are not so-called high butter fat men; butter fat is not the best solid to provide body for ice cream; these are manufacturers who make a high butter fat ice cream and cater only to exclusive trade and get a long price for it. One witness says:

"Speaking in a commercial sense, I do not believe raising the standard to 12% would materially affect the price of ice cream. It would diminish the amount of other solids which would be put in it; the milk producer's skim milk would go to waste. The use of condensed milk has very much increased during the last few years because of the increased demand for ice cream and the extensive use of mild solids in ice cream. Millions of gallons of skim milk used to be thrown away which is now converted into condensed milk and there is a ready market for it. My experience is that the public prefers 8% ice cream to 12%. The 8% standard was arrived at in Illinois by a commission which investigated the matter and arrived at the standard of 8%. I do not think there should be any standard at all."

Other witnesses gave similar testimony. One manufacturer of many years' experience says that years ago ice cream would test so low in butter fat that you would not know how to find it; that it was then made out of milk, eggs, and corn starch, but that later, "We enlarged the butter fat in it." He says that the man who makes high butter fat ice cream will have to demand more money for it;
that normal butter fat ice cream runs from 6% to 10%; that
28 the per cent of butter fat has no relation to its wholesomeness. Defendants show that consumers would eat a less quantity of ice cream which is rich in butter fat. This would decrease the consumption by the public, and the output and profits of the manufacturers. This would not, perhaps, be a reason for fixing a standard, but may bear on the motive of those who oppose it and affect their claims as to whether the standard is unreasonable. As stated, there are many formulas for making ice cream. Here is one:—

"Vanilla Ice Cream Without Cream or Milk.

One vanilla bean, 8 gills of syrup at 20 degrees, 18 egg yolks. (To be cooked and frozen.) Then work in a maringue made of 2 egg whites and ¼ lb. of sugar."

It is shown that the cost to manufacture ice cream containing 20% butter fat is 45 cents per gallon; containing 7.7%, 29 cents;

and that where condensed milk is used and the product contains 1.9% butter fat the cost is about 15½ cents per gallon.

We have set out these matters somewhat in detail for the purpose of showing that the consumer may be defrauded, and as showing the propriety or necessity for fixing a standard, or rather to show that the Legislature might properly so determine. We quote at some length from one of the documents submitted:

"Ice cream is one of the delights of the food adulterator, for ice cream is a mixture of various things in which each one more or less loses its identity. The adulterator is able therefore to inject all manner of inferior and often dangerous cheapeners into his product and to compete successfully with the honest manufacturer who
29 makes clean, wholesome ice cream.

"The honest ice cream maker today is working at a decided disadvantage when he is obliged to compete with the dishonest one, since the dishonest one need not label his product so that the ingredients will be shown to the consumer or even to the retailer. This fact was strikingly shown at a recent meeting of ice cream manufacturers in New York, at which one man present declared that it was impossible for a competitive ice cream maker to be honest.

"This man asserted, and with much reason, that there were three things that made manufacturers dishonest. These three things were the federal government and the state and municipal departments of health, all of which encourage the dishonest manufacturer at the expense of the honest one. As a basis of his argument this man presented three formulas for making commercial ice cream which speak for themselves. Here they are:

Formula No. 1.

Sells to retailer at $1.25 per gallon.

11 quarts 40% of cream at 45c	$4.95
5 quarts grade B milk at 6½c	.33
4 quarts condensed milk at 20c	.80
9 pounds sugar	.45
4 ounces extract	.40
	$6.93

"When expanded by freezing this quantity of ingredients produces forty quarts of ice cream, containing 20% butter fat at a cost of less than 80¢ per gallon.

Formula No. 2.

Sells to retailers at 90¢ per gallon.

3 quarts 40% cream at 45c	$1.35
13 quarts grade B milk at 6½c	.85
4 quarts condensed milk at 20c	.80
4 ounces gelatine at 24¢ per lb	.06
4 ounces extract	.40
7½ pounds sugar	.38
	$3.84

30 "These ingredients expanded by freezing yield forty quarts of ice cream containing 7½% butter fat at a cost of 38¢ a gallon.

Formula No. 3.

10 gallons of condensed milk	$8.00
10 gallons grade B milk	2.60
60 gallons plain water	0.00
4 pounds gelatine at 20c	.80
Color	.01
Flavor	1.00
60 pounds sugar at 5c	3.00
	$15.41

"These ingredients expanded by freezing yield 120 gallons of 'ice cream' at a cost of 13 cents a gallon.

"What the ice cream makers, and consumers as well, need is the creation of ice cream standards and laws which would compel the manufacturers who make 'cheap' ice cream to correctly label their product. A law is needed in New York and other places which will state how much butter fat must be contained in ice cream before it can be called ice cream, and which will prevent the use of gelatine reeking with millions of bacteria and of coal tar dyes, unless these ingredients are labeled.

"Ice cream is a commercially manufactured commodity, and as such should be adequately regulated by the health authorities, both for the benefit of the honest manufacturers and the innocent consumers."

Notwithstanding these conflicting opinions, it was a question for the Legislature to say whether this legislation was called for. The Legislature was not compelled to take the view of either those who favor or oppose a standard. Taking one view of it, conditions were such as to clearly sustain the action of the Legislature. We are not entirely satisfied that this would not be so if conditions were as claimed by the defendants. We are not to say, and do not, of course, determine that these defendants, or the association
31 appearing in argument, or any particular person is or has been guilty of any fraud or deception. The question is whether, without a standard, dishonest or unscrupulous manufacturers may do so. It is not practicable by any ordinary inspection for the purchaser to distinguish cheaper, low grade, ice cream from the better quality. Because of this, it is apparent from the matters which we have detailed that an opportunity is afforded for deception by selling an inferior quality of ice cream at the price of a better or more expensive grade. This was the case in the sale of oleomargarine.

State vs. Packing Co., 124 Iowa 323.

In this respect it differs from the case of Frost vs. Chicago 178 Ill., 250, where it was held that a person who is ordinarily careful

and intelligent could not be deceived by a netting covering for baskets of fruit. In such case the purchaser could still see and know what he was buying.

The purpose of the act in question was to prevent just such deception and fraud as would be possible without a standard and it seems to us it cannot be seriously claimed that the statute will not accomplish the end sought.

It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute and that the sale of such is entirely prohibited. This, we think is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk, if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream.

32 The State contends that every point in this case is decided against the contentions of defendants in State vs. Schlenker, supra, and State vs. Snow, 81 Iowa 642. They are very closely in point.

The only case called to our attention in which the question of fixing a standard for ice cream was decided is Bigbers vs. City of Atlanta, 66 S. E., 991. In that case, under an ordinance, the prohibition was not against selling ice cream of less than the prescribed percentage, as ice cream, but against selling it at all. The provision of the ordinance is:

"Ice cream sold or kept for sale must contain at least 10% butter fats, for fruit ice cream, and 12% for plain ice cream."

Under this ordinance, ice cream could not be sold or kept for sale unless it contained the required per cent of butter fat. As already stated, our statute does not prohibit the sale of such product. In the Georgia case, the court said:

"It might be permissible to say that the term 'ice cream' * * * should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality."

Thus recognizing the distinction which we make between that ordinance and our statute, and holding that the sale of ice cream may be regulated by fixing a standard. Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, but the sale of a product formerly known as ice cream, but containing a lower per cent of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is. It may be sold under some other name and the consumer will not be deceived for he now knows that when he buys ice cream he is getting an article containing a certain per cent of butter fat, and that this may not

33 be so if he buys something not as ice cream but as something else.

Defendants say their case comes within the doctrine of People vs. Marx, 99 N. Y., 377. This must be on the erroneous assumption

that the Iowa Statute prohibits absolutely the sale of their product if it contains less than the specified per cent of fat. The New York statute referred to in the Marx case did prohibit the sale of oleomargerine, which was shown to be a wholesome article and not injurious, and the statute was held invalid. That statute was amended so as to regulate the sale and held valid in People vs. Arensberg, 105 N. Y., 128; 11 N. E. 277. As amended, the statute was entitled: "An Act to prevent deception in the sale of dairy products, etc."

It prohibited: (1) The manufacture out of any animal fat, or animal or vegetable oils not produced from unadulterated milk, or cream from the same, of any product in imitation or semblance or designed to take the place of any natural butter produced from milk, etc.; (2) Mixing, compounding with, or adding to milk, cream or butter, any acids or other deleterious substances, or animal fats, etc., with design or intent to produce any article in imitation or semblance of natural butter; (3) Selling, or keeping, or offering for sale, any article manufactured in violation of the provisions of the section.

The defendant was convicted of selling the article manufactured in violation of the provisions of the act. The court said:

"Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin; and that it is cheaper and that it would be a violation of the constitutional rights
34 and liberties of the people to prohibit them from manufacturing or dealing in it for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter made from animal fats or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as 'dairy butter', or that it is beyond the power of the Legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects; but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other."

In Re Jacobs, 98 N. Y. 98, is cited. In that case the statute purported to be an act to improve the public health by prohibiting the manufacture of cigars in tenement houses. It was held that it was not a health law; that cigar making had no relation to the health of the public and that the act was not intended to protect the health of the occupants of the tenement. In that case it was held, and the proposition is not disputed by the State, that the constitutional

guaranty that no person shall be deprived of his property without due process of law may be violated without physical taking of property for public or private use, and that any law which de-
35 stroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

People vs. Biesecker, 169 N. Y. 53; 61 N. E. 990, is also cited. It was there held that the statute under consideration could not be justified as an exercise of power to prevent fraud or imposition on buyers and consumers.

We have referred to these New York cases more fully than necessary perhaps, but, because of the claim made for the Marx case, we have thought it proper to refer briefly to the others as well. The Marx case is cited and distinguished in State vs. Snow, 81 Iowa 642.

In Schmidinger vs. Chicago, 226 U. S. 578, 57 L. Ed., 364, it was held that a city ordinance fixing the weight of the standard loaf of bread to be sold in the city, and prohibiting the making or selling of loaves not up to the weight of the standard loaf is not such an unreasonable and arbitrary exercise of the police power as to render the ordinance void under the Constitution prohibiting the taking of property without due process. It was shown in that case that there was a considerable demand for loaves of different size, and that so fixing the size produced some inconvenience. The ordinance was sustained upon the theory that it tended to prevent fraud in the sale of bread. The court said:

"Furthermore, laws and ordinances of the character of the one under consideration and tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exercise of the police power," and that "This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard
36 sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of general welfare," and that "So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

That the Legislatures of the states may, in the exercise of the police power, regulate a lawful business, see Barrett vs. Indiana, 229 U. S. 26; 57 L. Ed. 1050.

The following cases may be cited as bearing upon the proposition that the Legislature, under its police power, may enact laws for the purpose of preventing fraud in the sale of food products:

State vs. Campbell, 64 N. H. 402.
Board vs. Van Druens, 72 Atl., 125 (N. J.)
People vs. Bowen, 182 N. Y. 1.
Chicago vs. Bowman Dairy Co., 234 Ill., 294.
People vs. Worden Grocer- Co., 118 Mich. 604.
State vs. Crescent Creamery Co., 54 L. R. A. 466 (Minn.)

All points raised by the demurrers have been noticed. We are of opinion that the statute is within the police power of the state and is not unreasonable. That it has a reasonable relation to the object to be effected and does not offend against either the Federal or State Constitution in any of the particulars mentioned. It follows that the court erred in sustaining the demurrers. Both cases are reversed and remanded.

Reversed and remanded.

The Justices all concur.

37 Draft.

Authentication of Record.

SUPREME COURT,
State of Iowa, ss:

I, B. W. Garrett, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 36, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager, vs. The State of Iowa, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Des Moines, Iowa, this 14th day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

B. W. GARRETT,
Clerk Supreme Court of Iowa.

38 Supreme Court of Iowa.

No. 29784.

STATE OF IOWA, Appellant,
against
HUTCHINSON ICE CREAM COMPANY and C. J. HUTCHINSON, Manager, Appellees.

Assignments of Error.

Now comes the above appellees and file herewith their petition for a writ of error, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the U. S. Supreme Court make the following assignment:

The Supreme Court of Iowa erred in holding and deciding that Chapter 166, Laws of the 31st General Assembly Supplement to the Code, Section 4999-a 15 to Section 4999-a 43 of the Laws of the State of Iowa as amended by Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa, were valid. The valid-

ity of such sections was denied and drawn in question by the defendants, appellees, on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Iowa erred in holding and deciding:

First. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa did not abridge the privileges and immunities of citizens or of these defendants-appellees, nor deprive them of liberty or property without due process of law, nor
39 deny to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa did not abridge the privileges and immunities of the defendants nor deprive them of their liberty or property in prohibiting the sale of ice cream under its own name, unless the said ice cream was made only of the ingredients and in conformity with the butter fat standards established by said act.

Third. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa did not establish an arbitrary classification and did not deny to defendants the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under its own name unless the said ice cream was made only of the ingredients specified and in conformity with the butter fat standards established by said act and in classifying ice cream as "ice cream," "fruit ice cream" and "nut ice cream" and requiring 12 per cent of butter fat by weight in "ice cream" and 10 per cent of butter fat by weight in "fruit ice cream" and "nut ice cream."

Fourth. That Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa was not an arbitrary and unreasonable regulation and interference with a lawful business and did not abridge the privileges and immunities of the defendants and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Fifth. That the legislature of a state had the right under the police power to select one formula for a product which was
40 not a substitute for or an imitation of another product and prohibit the sale of that product under its own name unless the product conformed to the specified formula and that Chapter 175 of the Laws of the 34th General Assembly of the State of Iowa so providing as to ice cream, did not abridge the privileges and immunities of the defendants and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

"For which errors the defendants-appellees, the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, pray that the said judgment of the Supreme Court of the State of Iowa, dated May 12, 1914, be reversed and a judgment rendered in favor of the defendants-appellees and for costs."

R. L. PARRISH,
Attorney for Appellees.

41 Supreme Court of Iowa.

No. 29784.

STATE O[illegible]OWA, Appellant,
against
HUTCHINSON ICE CREAM COMPANY and C. J. HUTCHINSON, Manager, Appellees.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, the appellees hereby pray a writ of error, from the said decision and judgment, to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignments of error herewith.

R. L. PARRISH,
Attorney for Appellees.

STATE OF IOWA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, to the State of Iowa, in the sum of Five Hundred Dollars; such bond when approved to act as a supersedeas.

Dated July 14th, 1914.

SCOTT M. LADD,
Chief Justice Supreme Court of Iowa.

42 HUTCHINSON ICE CREAM COMPANY and C. J. HUTCHINSON, Manager, Plaintiffs in Error,
vs.
STATE OF IOWA, Defendant-in-Error.

Know all men by these presents:

That we, the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager, as principals, and American Surety Co., of New York, and —— ——, —— —— as sureties, are held and firmly bound unto the State of Iowa in the sum of Five Hundred Dollars ($500.00) to be paid to the said State, for which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 2nd day of July, 1914.

Whereas the above named plaintiffs-in-error seek to prosecute their writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Iowa,

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs-in-error shall prosecute their said writ of

error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

HUTCHINSON ICE CREAM COMPANY,
By C. J. HUTCHINSON, *President.*
C. J. HUTCHINSON.
AMERICAN SURETY CO., OF NEW YORK, *Surety.*

Bond Approved and to Operate as a Supersedeas.
Dated July 14, 1914.

SCOTT M. LADD,
Chief Justice Supreme Court of Iowa.

43 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Iowa, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit or action between the State of Iowa and Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, and wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title; right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Hutchinson Ice Cream Company and C. J. Hutchinson, manager, as is said and appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of

the United States, the — day of July, in the year of our Lord one thousand nine hundred and fourteen.

[Seal U. S. District Court, Southern District of Iowa.]

[SEAL.] WM. C. McARTHUR,
Clerk of the District Court of the United States of America for the Southern District of Iowa,
By LOUIS J. ADELMAN, *Deputy.*

The foregoing writ is hereby allowed.

SCOTT M. LADD,
Chief Justice Supreme Court of Iowa.

44 Draft.

Certificate of Lodgment.

SUPREME COURT,
State of Iowa, ss:

I, B. W. Garrett, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 14, 1914, in the matter of the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager, against the State of Iowa;—

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Des Moines, Iowa, this 14th day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.] B. W. GARRETT,
Clerk Supreme Court of Iowa.

45 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Iowa, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Iowa, wherein the Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the

parties in that behalf. Witness, The Chief Justice of the Supreme Court of the State of Iowa, this 14" day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

SCOTT M. LADD,
Chief Justice Supreme Court of Iowa.

Attest:
B. W. GARRETT,
Clerk Supreme Court of Iowa.

DES MOINES, IOWA, July —, 1914.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

GEORE COSSON,
Attorney for the State of Iowa.

46 Draft.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Iowa, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Iowa, in the City of Des Moines, this 14th day of July, 1914.

[Seal of the Supreme Court of Iowa.]

[SEAL.]

B. W. GARRETT,
Clerk Supreme Court of Iowa.

Costs of Suit.

Costs of transcript, $6.80 paid by the Hutchinson Ice Cream Company, and C. J. Hutchinson, Manager.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT, *Clerk.*

[Endorsed:] Certified copy. State of Iowa, Appellant, vs. Hutchinson Ice Cream Co., and C. J. Hutchinson, Manager. State of Iowa, Clerk Supreme Court.

Endorsed on cover: File No. 24,354. Iowa Supreme Court. Term No. 235. The Hutchinson Ice Cream Company and C. J. Hutchinson, Manager, plaintiffs in error, vs. The State of Iowa. Filed August 25, 1914. File No. 24,354.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 40.

THE HUTCHINSON ICE CREAM COMPANY AND C. J. HUTCHINSON, MANAGER, PLAINTIFFS IN ERROR,

vs.

THE STATE OF IOWA.

BRIEF FOR PLAINTIFFS IN ERROR.

WALTER JEFFREYS CARLIN,
R. L. PARRISH,
Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 40.

THE HUTCHINSON ICE CREAM COMPANY AND C. J. HUTCHINSON, MANAGER, PLAINTIFFS IN ERROR,

vs.

THE STATE OF IOWA.

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error upon a judgment of the Supreme Court of Iowa which reversed a judgment of the District Court of Iowa, which district court held the statute in question to be unconstitutional.

The Hutchinson Ice Cream Company and its manager were prosecuted upon an information before a justice of the peace at Des Moines, Iowa, charged with the sale of adulterated food, in that it did sell "a certain food product called 'ice cream' which was adulterated in that it did not conform to the standards established by law, being deficient in butter fat" (Record, p. 3).

The Iowa statutes on which the prosecution is based are as follows:

Supplement to the Code, section 4999-a-22, subdivision 4, defining adulteration of food, provides that "any food that does not conform to the standards established by law is adulterated food," and section 4999-a-20 of the Supplement to the Code, which provides a penalty for selling a food product which does not conform to the said standard established by law, and chapter 175 of the thirty-fourth General Assembly of Iowa, which is an act to amend section 4999 of the Code relating to food standards, in part is as follows:

> "Section 1. Ice cream is the frozen product made from pure, wholesome sweet cream and sugar with or without flavoring, and if desired the addition of not to exceed 1 per cent by weight of a harmless thickener, and contains not less than 12 per cent by weight of milk fat and the acidity shall not exceed three-tenths of 1 per cent."

The defendants demurred to the information on the ground, among others—

> "That said statute is in violation of section 1, Fourteenth Amendment to the Constitution of the United States in that it arbitrarily interferes with personal liberty and private property without due process of law, having in fact no relation to the public health, comfort or welfare (Record, p. 3).

This demurrer was overruled by the magistrate, who upon hearing found defendants guilty and assessed against them a fine of $50.00, and judgment was entered accordingly. The plaintiffs in error appealed to the District Court of Polk County, Iowa, which sustained the demurrer of the plaintiffs in error, on the ground that the statute in question was unconstitutional, as being in violation of both the State constitution and the Constitution of the United States, and discharged the plaintiffs in error. (See Record, pp. 4-6.)

Thereupon the defendants in error appealed from the rul-

ing of the district court to the Supreme Court of the State of Iowa, and, in an opinion filed May 12, 1914, the Supreme Court of Iowa reversed the ruling and decision of the district court. (See Record, pp. 8-21.)

Thereupon the Hutchinson Ice Cream Company and C. J. Hutchinson sued out their writ of error from the said ruling and decision of the Iowa Supreme Court to the Supreme Court of the United States, which was allowed by the chief justice of the Supreme Court of Iowa (Record, pp. 24, 25).

Specifications of Error.

The Supreme Court of Iowa erred in holding and deciding:

First. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa did not abridge the privileges and immunities of citizens or of these plaintiffs in error, nor deprive them of liberty or property without due process of law, nor deny to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa did not abridge the privileges and immunities of the plaintiffs in error, nor deprive them of their liberty or property in prohibiting the sale of ice cream under its own name, unless the said ice cream was made only of the ingredients and in conformity with the butter-fat standards established by said act.

Third. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa did not establish an arbitrary classification and did not deny to defendants the equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in prohibiting the sale of ice cream under its own name unless the said ice cream was made only of the ingredients specified and

in conformity with the butter-fat standards established by said act, and in classifying ice cream as "ice cream," "fruit ice cream" and "nut ice cream," and requiring 12 per cent of butter fat by weight in "ice cream" and 10 per cent of butter fat by weight in "fruit ice cream" and "nut ice cream,"

Fourth. That chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa was not an arbitrary and unreasonable regulation and interference with a lawful business, and did not abridge the privileges and immunities of the plaintiffs in error and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Fifth. That the legislature of a state had the right under the police power to select one formula for a product which was not a substitute for or an imitation of another product and prohibit the sale of that product under its own name unless the product conformed to the specified formula, and that chapter 175 of the laws of the thirty-fourth General Assembly of the State of Iowa so providing as to ice cream, did not abridge the privileges and immunities of the plaintiffs in error and deprive them of their liberty or property, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States (Record, p. 22).

BRIEF OF ARGUMENT.

POINT I.

The police power may be exercised to protect the public health, morals, safety, and the general welfare, but it is at all times subject to the constitutional limitation that it may not arbitrarily take away the lawful rights of a citizen.

Statutes State of Iowa.
Lawton *vs.* Steele, 152 U. S., 133, 137.
Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, 558.
Dobbins *vs.* Los Angeles, 195 U. S., 223.
Yick Wo *vs.* Hopkins, 118 U. S., 356.
Chicago B. & Q. R. Co. *vs.* Ill., 200 U. S., 561, 592.
Murphy *vs.* People State of California, 225 U. S., 623.
Coppage *vs.* Kansas, 236 U. S., 1.
Commonwealth *vs.* Vrooman, 164 Pa., 316.
Toledo W. & W. R. W. Co. *vs.* City of Jacksonville, 67 Ill., 37.
People *vs.* Ringe, 197 N. Y., 149.
People *vs.* Havnor, 149 N. Y., 200.
People *vs.* Gillson, 109 N. Y., 397.
Austin *vs.* Tennessee, 179 U. S., 344.
Welsh *vs.* Swasey, 214 U. S., 91.

Point II.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question.

Dobbins *vs.* Los Angeles, 195 U. S., 223, 235.
Mugler *vs.* Kansas, 123 U. S., 622, 661.
Gulf C. & S. F. R. Co. *vs.* Ellis, 165 U. S., 150, 154.
Lochner *vs.* New York, 198 U. S., 45, 60.
Ives *vs.* Buffalo Ry. Co., 201 N. Y., 305.
Freund on Police Power, p. 53.
State *vs.* Marshal, 64 N. H., 549.
State *vs.* Myers, 42 W. Va., 822.
Price *vs.* People, 61 N. E., 344; 193, Ill., 114.
Price *vs* Illinois, 238 U S., 446.

Point III.

"Ice cream" is a generic term embracing a large number and variety of products, and ice cream has been sold under its own name for over one hundred years; it is not an imitation of or a substitute for any other confection or food.

Brief on the History and Present Meaning of Term "Ice Cream." Appendix.
Van Bremen *vs.* United States, 192 Fed., 904.
United States *vs.* Thirty Cases of Grenadine Syrup, 199 Fed., 932.
United States *vs.* One Car Load of C. H. & M. Feed, 188 Fed., 452.
Webster's Dictionary.
Century Dictionary.
Standard Dictionary.
U. S. Manual for Army Cooks.

Point IV.

The act in question as construed by the Supreme Court of Iowa is actually a prohibition of the sale of an admittedly wholesome article of food under its own name and enacts a purely arbitrary standard.

Forsythe *vs.* Hammond, 166 U. S., 506, 519.
Soon Hing *vs.* Crowly, 113 U. S., 703.
Yick Wo *vs.* Hopkins, 118 U. S., 356, 366.
Railroad & Telephone Co. *vs.* Brand of Equalysis, 85 Fed. Rep., 302, 317.
Heath & Milligan Mfg. Co. *vs.* Wurst, 207 U. S., 338.
Collins *vs.* New Hampshire, 171 U. S., 30.
Peo. *ex rel.* Farrington *vs.* Mensching, 187 N. Y., 8.
Nichol *vs.* Ames, 173 U. S., 509, 521.
State *vs.* Miksicek, 125 S. W., 501.
Coppage *vs.* Kansas, 236 U. S., 1.

Point V.

The act in question does not tend to prevent fraud.

People *vs.* Freeman, 242 Ill., 373.
Schollenberg *vs.* Penn., 171 U. S., 1.
State *vs.* Hanson, 136 N. W., 412.
State *vs.* Redman, 114 N. W., 137.
Brown *vs.* Piper, 91 U. S., 37.
Muller *vs.* Oregon, 208 U. S., 412.

Point VI.

If a standard for ice cream could be enacted under the police power, nevertheless the sale of ice cream as ice cream, even though it did not conform to such standard, could not under the police power be absolutely prohibited.

Rigbers *vs.* City of Atlanta, 66 S. E., 991.
Heath & Milligan Co. *vs.* Worst, 207 U. S., 338.
Murphy *vs.* California, 225 U. S., 623.

ARGUMENT.

POINT I.

The police power may be exercised to protect the public health, morals, safety, and general welfare, but it is at all times subject to the constitutional limitation that it may not arbitrarily take away the legal rights of a citizen.

The statutes of the State of Iowa which affect the question at issue provide as follows:

Section 4999-*a*21 provides in part: "The word 'food' as herein used shall include all articles used for food, drink, confectionery or condiment, * * * by man or domestic animals, whether simple, mixed or compound."

Section 4999-*a*22 defines adulteration and states in part that * * * "Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

The act in question is an act supplementing the code relating to food standards and which establishes an ice-cream standard. The entire act, after the enacting clause, reads as follows:

> "1. Ice-cream. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener, and contains not less than twelve per cent. (12%) by weight of milk fat, and the acidity shall not exceed three-tenths (3/10) of one per cent. (1%).
>
> "2. Fruit ice-cream. Fruit ice-cream is the frozen product made from pure, wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener and contains not less than ten per cent. (10%) by weight of milk fat.

"3. Nut ice-cream. Nut ice-cream is the frozen product made from pure, wholesome sweet cream, sugar and sound, non-rancid, nuts, and, if desired, the addition of not to exceed one per cent. (1%) by weight of harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat."

The Fourteenth Amendment protects the right of the citizen to engage in any lawful business, and when, as here, the business is not affected with any public interest the business can only be reasonably regulated.

Murphy *vs.* California, 225 U. S., 623.

This is stated in different language by Mr. Justice Pitney in Coppage *vs.* Kansas, 236 U. S., 1, where, writing for the court, he says at page 19:

"But, in our opinion the Fourteenth Amendment debars the States from striking down personal liberty or property rights or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated public welfare, and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the amendment."

In Walsh *vs.* Swasey, 214 U. S., 91, Mr. Justice Peckham, speaking for the court, said at page 105:

"The statutes have been passed under the exercise of the so-called police power, and they must have some fair tendency to accomplish or aid in the accomplishment of some purpose for which the legislature may use the power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed pursuant to the statute have no real substantial relation to a public object which government can ac-

complish, if the statutes are arbitrary and unreasonable and beyond the necessities of the case, the courts will declare their invalidity."

It is under the police power that the State seeks to uphold its right to standardize ice cream and we find that the court below (Record, p. 13) says the act is one to prevent fraud. We will discuss this at length under Point V, and point out that even if it were such an act it is unconstitutional, as being an absolute prohibition instead of a regulation (Point VI).

We direct attention of the court at this point to the fact that there is *no question of public health involved* in this case. (Opinion Iowa Supreme Court, page 6; Record, p. 13.)

The State makes no such claim nor could it do so. Certainly the percentage of butter fat in ice cream has nothing to do with its healthful qualities. Pure milk frozen with sugar and flavor, though it would contain less than three per cent of butter fat, would certainly not be claimed to be unhealthful. Water ices contain no butter fat at all, and certainly are healthful.

In the court below the State contended that "price" was an argument, in other words that the State could insist on a certain butter fat content in ice cream, so that the consumer would get his money's worth, and argued that the man who got a less percentage than that set by the statute was defrauded. Of course this would be an argument only when the *price* at which ice cream is sold is also fixed by statute. Because of these generalizations about the police power we wish to direct attention to a few decisions referring to the limitations of such power.

The police power is not unlimited, there must be a basis, an excuse, a reason for its exercise.

Commonwealth *vs.* Vrooman, 164 Pa., 316.

Or, as was said in the case of Toledo W. & W. R. W. Co. *vs.* City of Jacksonville, 67 Ill., 37:

> "Like other powers of the Government there are constitutional limitations to its exercise. It is not within the power of the General Assembly under the pretense of exercising the police powers of the State to enact laws not necessary to the preservation of the health and the safety of the community which will be oppressive and burdensome upon the citizen. If it prohibit that which is harmless in itself or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power and it would be the duty of the courts to declare such legislation void."

A Pennsylvania case which disposes directly of this question is the case of Powell *vs.* Commonwealth, 114 Pa., 273, where the opinion of the lower court says:

> "We think the line between the valid exercise of this police power and the invasion of private rights is well drawn in the opinion of the court by Earl, J., in Jacobs' case, 98 N. Y., 98, thus: 'Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and when its measures are calculated, intended convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final and conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen and interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared, and enforce the supreme law.'

> "To the same effect is Commonwealth *vs.* Bearse, 132 Mass., 542, where, speaking of the exercise of the police power, it is said: 'The legislature is largely the judge of its own powers with reference to these matters. If it can be seen, indeed, that the rights of property are invaded under the pretense of a police regulation, it would be our duty to interfere to protect them.'"

In the case of People vs. Ringe, 197 N. Y., 149, Chase, J., said:

> "A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals or general welfare. A statute cannot, under the guise of the police power, but really to effect some purpose not within such power, arbitrarily interfere with a person or property right."

The same principle was stated by Vann, J., in People *vs.* Havnor, 149 N. Y., 200:

> "It was expressly declared in that case (People *vs.* Gillson, 109 N. Y., 389) that the courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the common good, and that unless such relation exists the statute cannot be upheld as an exercise of the police power."

See also People *vs.* Gillson, 109 N. Y., 397, where it is said:

> "The following propositions are firmly established and recognized; a person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty' as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his

> Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. These principles are contained and stated in the above language in various cases, among which are Live Stock Association *vs.* Crescent City, etc., Co., 1 Abb. (U. S.), 388, 398; Slaughter House Cases, 16 Wall., 36, 106; Matter of Jacobs, 98 N. Y., 98; Bertholf *vs.* O'Reilly, 74 N. Y., 509; People *vs.* Marx, 99 N. Y., 377."

In the case of Lawton *vs.* Steele, 152 U. S., in the opinion of the court, at page 137, discussing the extent and limit of the police power, the court says:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purposes, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions on lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive but is subject to the supervision of the courts."

In the case of Austin *vs.* Tennessee, 179 U. S., 343, the court, speaking by Mr. Justice Brown, at page 344, said:

> "We are not disposed to question the general principle that the States cannot, under the guise of inspection of products, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, Minnesota *vs.* Barber, 136 U. S., 313; Brimmer *vs.* Rebman, 138

U. S., 78, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. The Passenger Cases, 7 How., 283; Welton *vs.* Missouri, 91 U. S., 275; Henderson *vs.* New York, 92 U. S., 259; Railroad Co. *vs.* Hausen, 95 U. S., 465; Guy *vs.* Baltimore, 100 U. S., 434; Ward *vs.* Maryland, 12 Wall., 418; People *vs.* Compagnie Gen. Transatlantique, 107 U. S., 59. In this connection we indorse fully what was said by this Court in Mugler *vs.* Kansas, 123 U. S., 623, 661; 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution.'"

This court, in the case of Connelly *vs.* Union Sewer Pipe Co., 184 U. S., 540, said, at page 558:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly

the power by appropriate legislation to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws they must be deemed unconstitutional and void. Gibbons vs. Ogden, 9 Wheat., 1, 210; Sinnot vs. Davenport, 22 How., 227, 243; Missouri, Kansas & Texas Railway vs. Haber, 169 U. S., 613, 626."

See also:

Dobbins vs. Los Angeles, 195 U. S., 223.
Yick Wo vs. Hopkins, 118 U. S., 356.
Chicago, B. & S. R. Co. vs. Illinois, 200 U. S., 561.

Point II.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative, question.

It is so frequently argued that the legislature having enacted a standard the courts are powerless in the matter that a brief reference to a few authorities on this subject is submitted.

Freund, in his work on the Police Power, says at page 53:

> "If courts say that the legislature is the sole judge of the propriety of a regulation of this character they simply surrender their power to control the validity of legislation."
>
> State vs. Marshall, 65 N. H., 549.
> State vs. Myers 42 W. Va., 822.

The Illinois courts have held that the question as to what are proper subjects of the police power is a judicial one.

Price vs. People, 61 N. E., 344; 193 Ill., 114.

The New York Court of Appeals, speaking by Werner, J., in Ives vs. Buffalo Ry. Co., 201 N. Y., 396, says:

> "But when an industry or calling is *per se* lawful and open to all, and therefore beyond the prohibitive power of the legislature, the right of governmental control must be confined to such reasonable enactments as are directly designed to conserve health, safety, comforts, morals, peace and order" (Lochner vs. New York, 198 U. S., 45)."

The sale of a wholesome article of food is within the constitutional protection of liberty and property.

> Chicago vs. Netcher, 183 Ill., 104.
> Helena vs. Dwyer, 645 Ark., 424.
> *In re* Jacobs, 98 N. Y., 110.
> People vs. Biesecker, 169 N. Y., 53, 57.

In view of the fact that this court has recently considered the validity of a statute affecting the sale of a preservative for foods, a further discussion is deemed unnecessary.

> Price vs. Ill., 238 U. S., 446.

Point III.

"Ice cream" is a generic term embracing a large number and variety of products, and ice cream has been sold under its own name for over one hundred years. It is not an imitation or a substitute for any other confection or food.

The statute in controversy assumes to define ice cream and in effect provides that ice cream shall, from the date of the enactment of the statute, cease to be that product commonly and customarily known as ice cream, and shall become a new and different commodity by fiat of the legislature.

The State reasons that because the legislature has enacted this statute all ice cream not containing twelve per cent of butter fat is a spurious article. Such reasoning is without basis, for it begs the entire question, which is, What was ice cream within the common knowledge of the people be-

fore the statute was enacted? In other words, has the Iowa legislature attempted to deprive manufacturers and dealers of the right to sell a wholesome product under its own name?

Our proposition is that "ice cream" is not and never was, at least previous to the enactment of the statute in controversy, a term used to designate a product containing any stated amount or proportion of butter fat. The question is, What idea does the term "ice cream" convey to persons of ordinary intelligence who are conversant with our language?

To answer this question we must find out what ice cream is. We first find that the term "ice cream" is generic, like "candy," "confectionery," "bread," "cake," "pudding," "soup," etc. It is the general name for a large class or group of products having some characteristics in common, but varying widely as to ingredients—this variety extending to kind as well as to proportions.

A case involving the question of the common acceptance of a term is United States *vs.* Thirty Cases Purporting to be Grenadine Syrup, 199 Fed., 932. It is elementary that the court, to find the meaning of a term, may resort to any authoritative sources of information to enlighten its judgment, but the case of United States *vs.* One Car Load of Corno H. & M. Feed, 188 Fed., 452, makes clear the distinction between common knowledge and common ignorance. In that case the Government attempted to prove common knowledge by showing that their inspectors interviewed a number of persons, who stated that if he showed them a label reading "oat feed" they would expect to get ground or crushed oats. It was not shown that the persons of whom the inspectors inquired had any knowledge of the commodity "oat feed." The court held such testimony valueless, saying in part, at page 462:

> "The issue, however, is not what such persons with such lack of familiarity with the product would understand 'oat feed' meant, but what idea the term ought to convey to persons of ordinary intelligence,

who are conversant with our language. The power of Congress to pass the statute is derived solely from its authority to regulate commerce, and it must have uniform operation throughout the United States. It deals with articles of food which enter into interstate commerce. It would be unthinkable that Congress intended that a product could be seized in one district and not in another for a misleading brand, according or not as the generality of persons in those districts understood or were deceived by the brand on the particular product.

"Language is 'the expression of thought by means of spoken or written words,' and words are but signs of ideas. If a person does not know English, he cannot understand the idea or conception or sign meant to be conveyed by a word. So as to a commodity term; people unfamiliar with the term or its meaning, seeing on a label the word which stands for a commodity term, would not know what it meant, and numbers of them would state, quite honestly, that, seeing the words 'oat feed' on the label, they were deceived as to what it meant and thought 'oat feed' meant to describe the grain of the oat, rolled, crushed, or chopped.

"All words in the beginning were arbitrary signs. They became part of the language only by common usage among the people after they had generally been accepted or taken to express or stand for a particular thought or idea. When a word obtains such currency or general acceptation, the people use it to convey that particular idea to the persons to whom it is addressed, and the word continues to have that meaning and function in the language until common usage among the people accords another and different meaning to it. Language grows and changes with the growth and changes in social and economic conditions, and expressions creep into the language by a gradual process of evolution wrought by the necessity for more precise expressions and greater convenience in depicting old ideas or new conditions and things. Words are thus being constantly coined and put in circulation, and, their meaning being generally understood among the people, they become accepted parts of our speech, sometimes for years, before they are formally acknowledged and incor-

> porated in standard dictionaries. A century ago no one would have understood what idea was meant to be conveyed by the words, 'chloroform,' 'telephone,' 'telegraph,' 'aeroplane,' 'automobile,' 'X-ray' and the like. Now they are common nouns, parts of common speech, and understood by all who speak our language."

See also Von Bremen *vs.* United States, 192 Fed., 904.

Applying the above principles to the present case, we ask a consideration of the question as to what is the true meaning and use of the term "ice cream" as generally understood among the people and as commonly used in trade and commerce.

The common knowledge that ice cream is made in various ways is recognized and plainly indicated in various dictionaries, where "ice cream" is defined as follows:

Webster—

> "Cream or milk sweetened, flavored and congealed by a freezing mixture. Sometimes, instead of a cream, the materials of a custard are used."

Century—

> "A confection made by congealing variously flavored cream or custard in a vessel surrounded with a freezing mixture."

Standard—

> "Cream, milk, or custard, sweetened and flavored, and frozen by a freezing mixture, being usually agitated by a dasher in the process, to make it of uniform consistency."

From this it appears that while ice cream may be made of cream, sugar and flavor, it may also be made of milk, sugar and flavor, or of custard. It follows that the three principal ingredients here mentioned might be combined in an ice cream. The cook books in general use today as well as those of an earlier time are warrant for the statement

that a very much wider variety of ingredients has been used in ice cream from the time it came into common use as a dessert and as a light refreshment.

It is and for many years has been the custom of the trade to use condensed or evaporated milk as an ingredient of ice cream. There is no fixed rule or custom as to the amount or proportion of condensed milk used, the amount or proportion being varied in different kinds of ice cream, and it is significant that the amount or proportion varies widely in the products of different manufacturers. In some ice creams no condensed milk is used; in some there is no cream, and in still others there is neither condensed milk nor cream. The Manual for Army Cooks, the official publication of the United States Army, prepared under the direction of the Commissary General of Subsistence and published by authority of the Secretary of War, shows this. In the edition of 1896, page 199, the formula given for ice cream is:

> "1 pint milk, 1 scant cupful flour, 1 quart cream, 1 cupful sugar, 2 eggs, 1 tablespoonful flavoring extract.
>
> "Boil the milk; mix together the sugar, flour, and eggs and stir into the boiling milk. Cook twenty minutes, stirring often. When cool add another cupful of sugar, the flavoring and cream. Freeze in ice and salt.
>
> "Fruit of all kinds, chocolate, coffee, etc., can be used as flavoring."

The 1910 edition of this Manual for Army Cooks, at p. 117, gives, among other formulas for ice cream, the following:

> "2½ quarts water, 3 ounces flour, 1½ pounds sugar, 10 eggs, ¼ ounce extract, 2 12-ounce cans evaporated milk."
>
> "Boil 2 quarts of water and add a batter made of the flour and 1 pint of water; then allow to come to a boil again, remove from the range, and add the

sugar, eggs, a pinch of salt, flavoring extract, evaporated milk, and sufficient water to make 1 gallon. Whip well, and allow to cool before putting in the freezer. One gallon is sufficient for 20 men."

Eggs in varying amount or proportion are called for in some ice creams—some kinds of ice cream—while other ice creams are made without eggs. The same is true as to all other ingredients, for even sugar is omitted in some special cases.

No cook book offered with any pretense of completeness or authority limits ice cream to one formula (Appendix, p. 90). The dictionaries do not so limit ice cream (Appendix, p. 71). The custom of the trade and the custom of the people do not so limit it.

So that this act of the Legislature limiting the number of permissible ingredients in ice cream and requiring that ice cream shall contain not less than 12 per cent of butter fat, and limiting the application of the name "ice cream" to one type or kind of ice cream is nothing short of arbitrary and unreasonable, nothing short of an unwarranted interference with a lawful business—depriving manufacturers of ice cream of property rights of great value and depriving both manufacturers of ice cream and the people of their liberty.

The derivation and meaning of the term "ice cream" are important and must be here considered.

(Corno H. & M. Feed case, *supra.*)

It is submitted that there is no reasonable basis for the Legislature's assumption that ice cream made of cream, sugar and a flavor is the only real, genuine or pure ice cream. The name "ice cream" carries no such inference. The name or term comes to us from France by way of England. The French term is "crême glace" and the English translation of it is "cream ice" or "ice cream" (Appendix, p. 19). In England the form "cream ice" is in general use, while we give preference to "ice cream."

In France and in England and with us the group of cream ices or ice creams is but a subdivision of the family of ices. Our dictionaries tell us that an ice is a frozen dessert, as ice cream or water ice; and in many of our hotels and restaurants and many of our cook books the term "ices" is employed even today as a general name for all frozen desserts, including biscuits, puddings and charlottes as well as ice creams, water ices, punches, etc. So that it is common knowledge that ice cream is first of all an ice.

It is obvious, from the definition and standard laid down by the Legislature, that the Legislature acted on the violent assumption that the term "ice cream" is compounded of the verb "ice" and the noun "cream," and that the cream indicated is the cream from milk. Yet even the Legislature dared not to follow this assumption to its logical conclusion and say that such cream frozen is ice cream, but included sugar, flavor and a "thickener," recognizing custom and common knowledge to that extent. The Legislature did, however, dare to disregard all other custom and common knowledge that go to prove the error of giving to "cream" a preponderant value and narrow meaning in the term "ice cream."

Since the definition and standard laid down by the Legislature are inseparable, and it is not within the power of the Legislature to limit and restrict unreasonably the meaning and application of words or terms in common use, we ask this court to weigh the value of "cream" in the term "ice cream."

In cookery the word "cream" has various meanings and applications. We find it used as a verb, as an adjective and as a noun, and with such latitude that almost invariably it is necessary to go to the context to determine the sense in which it is used, and, especially where it is an element in a compound name or term, to determine whether it is preponderant or subsidiary. In the term "ice cream" we submit that "cream" is subsidiary.

Cooks and the makers of cook books have always used

the word "cream" with great freedom, and the fact that many of the meanings implied by their use of the word have become fixed in our language is the best evidence that the uses they made of the word were good.

The cook books are themselves the best evidence that the term "ice cream" has always been applied to all ices that were made principally of cream, that contained cream, or that were so compounded of various ingredients as to resemble cream in appearance or consistency. To other products, from confectionery, cakes and pastries to gruels, soups and gravies, the term has been and is applied with equal freedom and latitude, and we have yet to learn that it has been proposed to upset this usage in any case except that of cream ice or ice cream.

We protest that our extensive use of cream in the manufacture of ice cream is no warrant for the assumption that the public has been lately or ever was under the belief or impression that "cream" in the term "ice cream" means the cream from milk and nothing else. (Appendix pp. 12 and 13.) "Ice cream" means no more and no less today than it has meant since the term came into common use, and its meaning is well understood by the people generally; therefore our use of it as the general name for our products cannot deceive or tend to deceive our customers. The use and meaning of this term is stamped upon our language, as evidenced by our dictionaries and the record of its use in the same sense in which we use it today is preserved in the cook books of five or more generations.

We contend that the limiting of the meaning of the term "ice cream," not to say perversion, and the restriction of its application and use amount to an abridgement of the constitutional liberty of ice cream manufacturers and to a taking of their property without due process of law.

The citing of the other State standards merely shows how little basis there is for saying that ice cream should be made only from cream and contain twelve per cent of butter fat,

for we find that some other States refused to adopt standards, while others have adopted standards of 4, 7, 8, 12, and 14 per cent. of butter fat, and from permitting the product to be made of anything, as long as the required per cent. of butter fat is obtained, to requiring it to be made chiefly of milk substances, milk and cream, and finally of cream alone. This failure of the States to agree upon a standard shows conclusively that there is no such thing as a standard ice cream, and certainly does not tend to show that ice cream should be made of cream alone and contain 12 per cent. of butter fat.

In the court below reference was made to the so-called Government standard.

The so-called Government standard (Circular 19, U. S. Dept. of Agriculture) was issued under a provision of an appropriation law after Congress had refused to enact standards in the Food & Drugs Act and was issued *just four days before the Food & Drugs Act was approved.* The passage of the Food & Drugs Act left these standards without force; in fact, it never was an offense to violate them, as the appropriation bill contained no such provision. Attempts made to enforce these standards of Circular 19 were failures (United States *vs.* St. Louis Coffee & Spice Mill, 189 Fed., 191). In fact the Government itself successfully contended that it was not bound by these standards (United States *vs.* 100 Bbls. of Vinegar, 188 Fed., 471).

Discussing the standard for ice cream the Secretary of Agriculture states, under date of June 8, 1910:

> "In answering the question in regard to this ice cream standard, it should be pointed out to you that Circular No. 19 has not the force and effect of law, and is not so construed by this Department in enforcing the Food & Drugs Act. It is used merely as an advisory factor."

Three attempts were made to enforce the so-called Government standard for ice cream.

The first was United *vs.* Bischof, tried in the Police Court (United States Branch), District of Columbia, before Judge Mullowney. The decision is reported in the Washington Law Reporter, Volume 38, page 137, and the court found:

> "That the definition for ice cream, as promulgated by the Department of Agriculture, and set forth in Circular No. 19, is of no force or effect as a legal standard, and is only admissible in evidence as giving one definition of ice cream, namely, the definition of certain officials of the Department of Agriculture.
>
> "That the percentage of butter fat had nothing to do with the determination as to whether or not the product in question was ice cream. The court said that from the five standard dictionaries examined by him and the information on the subject afforded by the evidence, it was not essential that ice cream be made entirely from pure cream, but milk might be added, or it may be made of a custard frozen, and denominated ice cream.
>
> "As to what is a violation of the Pure Food Law, the court said: 'I do not define ice cream, as a matter of law; I simply say that upon the evidence in this case, an article composed of half milk and half cream, sweetened and flavored, with six ounces of what they call "cream thick," is not an adulteration or imitation of ice cream, within the meaning of the statute.'
>
> "The court holds that one way to find out what the public, in general, have understood ice cream to be, is to take the definition for ice cream given in the standard dictionaries and the various recipes given in standard cook books."

The next case was tried in 1911 in the third judicial district of the Territory of Arizona. The case went to the jury, who found the defendant not guilty (United States Dept. of Agriculture, Notice of Judgment, No. 1446).

The third and last attempt was made in the same court and in the same year, 1911. The ice cream in question con-

tained 7.09 per cent of butter fat. The judge directed a verdict in favor of the defendant and found that there was no Government standard (United States Dept. of Agriculture, Notice of Judgment, No. 1450).

In connection with this question plaintiff in error has filed, as an appendix to its brief, a "Brief on the History and Present Meaning of the Term ICE CREAM," compiled by Professor Child, of the University of Pennsylvania. The court's attention is especially called to this appendix as being a most comprehensive, exact, and authoritative statement on that subject.

It is difficult by quotation to do justice to the completeness with which the author has demonstrated the real meaning of the term "ice cream." However, we venture to call attention to the following extract from page 27 of this compilation:

> "No serious conflict exists between popular understanding and actual meaning of the term ice cream. Ice cream is so familiar an institution in the home, in the street, at the confectioner's—and, in the home, the male, as well as the female, members of the household, so generally engage in making it—that appeal can confidently be made to a universal understanding of its meaning. The dish is called typically *ice cream*, irrespective of its kinds, whether a cream mixture or water ice. One makes "ice cream," one buys it of the "ice cream" man in the street. In any of these cases "ice cream" may mean or include water ice.
>
> "Further, it is a fact universally known that the term *ice cream* covers a wide variety of mixtures. It is known that very rarely, indeed, even in households that could well afford it, is ice cream made with cream of milk alone, because of the cost and as being too rich. It is very generally known that the amount of cream of milk may be varied according to the other ingredients used. It is very generally known that the addition of whites of eggs improves smoothness, and that the addition of yolks enriches the mixture and improves its color. It is everywhere known that

there is a gradation from rich mixtures down to use of milk only, in which cases in common domestic use cornstarch is added, and the mixture is brought to the boil. This, the poorest form of ice cream, is called 'frozen custard.' The only popular misapprehension is, as explained above, that the flavor disapproved of in this type of mixture is due to the presence of eggs, whereas it is due to the scalding or boiling in particular, to the presence of cornstarch, if used, and to the lack of compensating richness or intensity of flavoring, to cover the boiled taste."

Again Professor Child says (Appendix, p. 4):

"It has been asserted (cf. 1. 34) that *cream* in the compound *ice cream* means the oily part of milk, which it does not mean, did not mean when the compound was adopted in English, and has never meant since.

"Further (cf. 1. 35), it has been asserted that use of the term should be limited to the confection as made with cream (in that sense) alone—ostensibly for the interests of the public, but in violation of the true meaning, and, it may be added, plainly to the prejudice of the public interest, if due consideration is given the pertinent facts."

Finally, we refer the court to the argument as to the legality of butter fat standards for ice cream presented by Professor Child (Appendix, pp. 32 to 36, inclusive), which presents the layman's viewpoint tersely and, we submit, accurately.

Point IV.

The act in question, as construed by the Supreme Court of Iowa, is actually a prohibition of the sale of an admittedly wholesome article of food under its own name, and enacts a purely arbitrary standard.

It is a familiar principle as applied to the question of police power that the legislature cannot prohibit the sale of a wholesome commodity in the absence of fraud.

Assuming that we have shown that the term "ice cream" is, in the trade and to the common understanding, a generic term, having a well-established meaning as applied to a large number of varieties of a certain class of confections, so that the implications of fraud or deceit cannot possibly arise from the sale of any of these varieties under the generic name "ice cream," it necessarily follows that the legislature in this case has attempted to prohibit the sale of a wholesome commodity under such conditions that the claim of possible fraud cannot be urged to support the enactment.

The Supreme Court of Iowa recognized the force of this proposition and evidently hesitated somewhat for an answer. We submit that the one given in the opinion is illogical and not really an answer, but rather an avoidance of an obstacle which the court did not see fit to attempt to remove. The Iowa court said (Record, p. 18):

> "It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute and that the sale of such is entirely prohibited. This, we think, is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk, if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream.

"The State contends that every point in this case is decided against the contentions of defendants in State vs. Schlenker, *supra*, and State vs. Snow, 91 Iowa, 642. They are very closely in point.

"The only case called to our attention in which the question of fixing a standard for ice cream was decided is Rigbers vs. City of Atlanta, 66 S. E., 991. In that case, under an ordinance, the prohibition was not against selling ice cream of less than the prescribed percentage, as ice cream, but against selling it at all. The provision of the ordinance is:

"'Ice cream sold or kept for sale must contain at least 10% butter fats, for fruit ice cream, and 12% for plain ice cream.'

"Under this ordinance, ice cream could not be sold or kept for sale unless it contained the required per cent of butter fat. As already stated, our statute does not prohibit the sale of such product. In the Georgia case, the court said:

"'It might be permissible to say that the term "ice cream" * * * should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality.'

"Thus recognizing the distinction which we make between that ordinance and our statute, and holding that the sale of ice cream may be regulated by fixing a standard. Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, *but the sale of a product formerly known as ice cream*, but containing a lower per cent of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is. It may be sold under some other name and the consumer will not be deceived, for he now knows that when he buys ice cream he is getting an article containing a certain per cent of butter fat, and that this may not be so if he buys something not as ice cream but as something else." (Italics ours.)

The Iowa Supreme Court assumes premises which do not exist. It attempts to make a distinction where there is really no distinction. It states that there is a substantial difference between forbidding the sale of the product ice cream as ice cream and absolutely prohibiting the sale of ice cream containing less than 12 per cent butter fat.

While the State may prohibit the sale of ice cream which contains any deleterious substance or is otherwise impure or unwholesome, it cannot arbitrarily prescribe that ice cream containing less than a certain percentage of butter fat shall not be sold as ice cream. The Court of Appeals of Georgia, in the case of Rigbers vs. City of Atlanta, 66 S. E. 991, said in part:

> "Ice cream, however, is a luxury rather than a necessity. Still, since it is a foodstuff, the regulation of the sale of it, so far as is necessary for the prevention of impurities, adulterations, and other similar things likely to affect the health of those using it, is also within the police power of the city; and if this ordinance, so far as the sale of cream is concerned, had that end in view, the court should not declare it to be unreasonable or beyond the powers granted by the city charter. The complaint against the defendant's ice cream was not that it was impure or that it contained deleterious substances, or that it was likely to affect the public health, but that it was not rich enough in butter fats. The defendant, for the purpose of showing the invalidity of the ordinance as a health measure, offered to prove that the presence of this amount of butter fats was not essential to the ice cream's being healthful—that the ice cream he was selling was just as good, from a sanitary standpoint, as the ice cream of the character prescribed by the ordinance would be. This evidence was admissible. The rule is that where an ordinance is not passed by express authority of the legislature, the courts may inquire into its reasonableness, and to that end may hear testimony.
>
> "It is plain, from the ordinance itself, however, that 10 per cent or 12 per cent of butter fats is not

essential to the wholesomeness of milk or of milk products, for, as to the milk itself, there is a prescribed percentage of 3.6 per cent of butter fats.

"Indeed, to state the matter with perfect fairness, the city does not really insist that the portion of the ordinance relating to the richness of ice cream was enacted for the protection of the public health, but rather insists that this part of the ordinance is valid as a measure for the protection of the members of the general public against being cheated by having ice cream of inferior value furnished them. It may be a serious question as to whether the provisions of the pure-food law of this State are not broad enough to take away from municipalities the right to prescribe standards of foodstuffs for the purpose of protecting the public from impositions not directly affecting the public health, but it will not be necessary to decide that point here.

"It will be noticed that under this ordinance the prohibition is not against selling ice cream of less than the prescribed percentage as ice cream, but against selling it at all. Though the seller distinctly informs the purchaser that the ice cream contains less butter fats than 10 per cent, the sale is unlawful, according to the ordinance. Even if the city has the power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold as standard ice cream, it still would not have the power to say that ice cream below that standard should not be sold at all.

"For instance, it might be permissible to say that the term 'ice cream,' or 'standard ice cream,' or 'first-class ice cream,' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality. But under the ordinance before us, if a physician desired that a patient should have ice cream, but did not deem it safe for him to take the richer ice cream, it would be illegal for any one to furnish the grade of ice cream actually suited to the sick man's physical condition."

The suggestion of the court below—apparently made in all seriousness—is that if you make ice cream which has less than 12 per cent butter fat you can sell it, *but not as ice cream.*

Ice cream in which eggs are an ingredient is no longer ice cream, for eggs are not permitted by the statute, and this is true, though the finished product contains more than 12 per cent butter fat. Ice cream made of milk, cream and condensed milk containing between 9 and 10 per cent butter fat (which, though the record does not disclose it, is the fact as to the product in question, and the statute is equally applicable whether the product contains 11 or 4 per cent. of butter fat) is to be sold as "frozen skim milk." This is not our suggestion, but that of the court below, which holds: 1. That if a manufacturer uses an ingredient in addition to dairy cream, such as milk, condensed milk or eggs, his product cannot be sold as ice cream. 2. That regardless of the ingredients used, if the finished product contains less than 12 per cent butter fat it is not ice cream.

The court below says that statute does not prevent the sale of ice cream—it only prevents the sale of ice cream as ice cream. If you take ice cream and misbrand it and call it "frozen skim milk" or "frozen dainties" or some other name, not already in use for some other food substance, it is all right. This shows how far the court had to go in order to sustain this act. The court actually says: "Our statute fixes a standard for ice cream and prohibits the sale of anything else as ice cream, *but the sale of a product formerly known as ice cream,* but containing a lower per cent. of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is." (Italics ours.) Well, what is it? It was ice cream; it is ice cream within the common knowledge; what has it become by legislative fiat? If the Legislature can select one formula for ice cream and the other ice creams are then sold for "frozen dainties," then the Legislature may standardize "frozen dainties." If then the public still demand the

product it may be sold as a "creamy ice," and so we could go on.

Recognition by the court below of the fact that the Legislature in fact selected but one formula of many and forbade the sale as ice cream of "a product formerly known as ice cream" demonstrates conclusively that the court reasoned in a circle. It assumed the validity of the statute in question, and reasoned that all other products which admittedly before the passage of the statute were ice cream had now ceased to be ice cream because the definition in the statute excluded them and that the statute prevented a fraud, which could not have occurred before the passage of the statute. *The State seeks by a statute to correct an evil created by the statute itself.*

It is true that this court will follow the construction placed upon the State statute by the highest court of the State (Forsythe *vs.* Hammond, 166 U. S., 506, 519), but the act in question must be judged by its natural effect and not by its proclaimed purpose, and this court may decline to concur in the view of the State court as to the real effect and operation of the statute.

Soon Hing *vs.* Crowly, 113 U. S., 703.

Yick Wo *vs.* Hopkins, 118 U. S., 356, 366.

Railroad & Telephone Co. *vs.* Brand of Equalysis, 85 Fed. Rep., 302, 317.

Mr. Justice Pitney, writing for the court in Coppage *vs.* Kansas, (236 U. S., 1-15), said:

> "But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the State court. St. Louis South Western R. Co. *vs.* Arkansas, 236 U. S. 350, 362, ante, 265, 271, 35 Sup. Ct. Rep. 99, and cases cited."

The Iowa act as construed by the Iowa Supreme Court is virtually a prohibition of the sale of an admittedly wholesome article of food under its own name. We submit that the effect of this construction is to take away from manufacturers the right to sell their product and to say that they can sell it as something else gives them no privilege of value. Persons ask for "ice cream," not something else, and the situation is well within the principle of the case of Collins *vs.* New Hampshire, 171 U. S., 30.

If the statute permitted the sale of a product as ice cream, provided the ingredients used were named on the label or the amount of butter fat therein stated thereon, we would have a different case, a case which might come within the decision of this court in Heath & Milligan Mfg. Co. *vs.* Wurst 207 U. S., 338, where the court sustained a statute requiring labeling of mixed paints. In that case the manufacturer was not deprived of the privilege of selling his product as a mixed paint, but only required to label it when certain ingredients were used. We have no such case here. In this case we have an absolute prohibition of the use of any but certain ingredients and an absolute prohibition of the use of the name "ice cream" for products where any but the enumerated ingredients are used. *Under the statute, as construed by the Iowa Supreme Court, ice cream cannot be sold as ice cream even if the ingredients are stated on the label and their proportions set forth.*

In the Heath case there were a number of admissions made that certain ingredients were the customary ones and that the ingredients which the manufacturers proposed to use were new and in fact were substitutes for old and well-known ingredients. In this case we have no such admissions; no such state of facts.

If it could be shown that ice cream was originally made of cream of milk, sugar and a flavoring ingredient, or if it could be shown that at any time it had been the universal practice so to make ice cream either in the homes of the people or in

the trade, then these two cases would be parallel to the extent that it might be that labeling might be required and then be held that there is a reasonable basis for the contention that the purchaser of ice cream might reasonably expect the product delivered to contain some certain amount or percentage of milk fat. But it is impossible to show that, as it is not a fact. The facts of knowledge show plainly not only that the earliest ice creams were not so made, but also that time and changing customs and practices have never tended to limit the variety of ingredients used in ice cream, nor to fix proportions, but that, on the contrary, there has been a tendency, if not indeed a continuing effort, to widen variety in ice creams, to make new combinations, both as to the ingredients used and as to their proportions in the combination.

We have been able to find no authority and the State and court below have been unable to point to an authority to support the proposition that the legislature may forbid the sale of a wholesome food product under its own name, when the product is not an imitation of or a substitute for any other product, or that the Legislature may arbitrarily select one variety of a product and say that from that time on all other varieties of the same product shall cease to bear that name under which they have customarily been sold for over one hundred years.

Further, the statute in question is a purely arbitrary one and is a regulation without any reasonable basis in that, first, it excludes from use in the manufacture of ice cream ingredients which have always heretofore been used; second, that it arbitrarily establishes a percentage of butter fat by weight; and third, it establishes an arbitrary and unreasonable classification of ice cream.

In excluding milk, eggs, condensed milk and other wholesome ingredients the statute certainly is arbitrary. If the State can exclude these ingredients and permit cream only, it certainly could, in the same arbitrary man-

ner, forbid the use of cream and permit the use of milk and condensed milk only, or it might require the product to be made of milk and eggs only. Milk and eggs make a fine base for a high class ice cream. We submit that there is no basis for the selection of but *one* of the customary and usual ingredients to the exclusion of all others.

The Food Standard Commission of Illinois, the only State which attempted to make an investigation of the question, found and published in their official bulletin as follows:

> "Ice cream is a frozen substance, made from cream, or milk and cream, and sugar, with or without the addition of such other wholesome substances as have cutsomarily * * * been used in making ice cream, and contains not less than eight per cent (8%) milk fat.
>
> "* * * The following other substances have customarily been used in making ice cream: Eggs, flours, starches, butter, gelatin, flavoring, harmless colors, nuts, fruits, pastries and condensed milks."

Why they put the "eight per cent" in the standard, no one knows, for the Commission's report states that their reasons were too lengthy to be placed in the report.

However, it is to be noted that the sale, under its own name, of ice cream containing less than eight per cent butter fat or otherwise failing to conform to this standard is not prohibited, for section 27 I of chapter 127 B of the Revised Statutes of Illinois, which enacts certain standards and authorizes the Food Standard Commission to promulgate standards, contains this proviso:

> Provided, that nothing in this section shall be construed to prevent the sale of any wholesome food product which varies from such standards, if such article of food be labeled so as to clearly indicate such variation."

Ice cream is sold by the plate, pint, quart or gallon. It

is never sold by weight, yet the statute provides for a percentage test by weight.

Ice cream with the *same* percentage of fat may *vary in amount* of fat in a measured quantity and of course the public are only interested, if at all, in the *amount* of butter fat they receive.

That the *percentage* of butter fat of two or more ice creams may be the same, yet the *amount* of butter fat in each be different, can readily be shown. When the ingredients of ice cream are ready to be frozen, the manufacturer refers to it as "mix" or "mixture" and all mixtures are figured on a basis of the amount of ingredients necessary to make 10 gallons of the finished product. To make ten gallons of ice cream, some manufacturers use five gallons of mix, some use six gallons, some seven, some eight and others nine, and in the freezing process the mix, whether it be five, six, seven, eight or nine, is beaten up to make ten gallons or thereabouts. In fact, these variations as to amount of mix used are frequently made where the same manufacturer produces different kinds of ice cream.

It is right here that the difference arises. It is merely a question of how much mix is used to make the ten gallons which controls the *amount* of butter fat the consumer receives, and this, though the percentage by weight of butter fat may be the same or may vary according to the amount of swell obtained, that is, according to the amount of air which is incorporated into the product. So, if we assume that the various mixtures have the same weight per gallon, say 10 pounds, then take 5 gallons (50 lbs.) of 12 per cent mix to make 40 quarts of finished product, and the finished product will weigh 5 lbs. to the gallon and each gallon will contain .6 pound of butter fat.

Take 6 gals. of 12% mix
6 lbs. to gal. finished
12%

.72 lb. butter fat to gallon.

Take 7 gals. of 12% mix
7 lbs. to gal. finished
12%

.84 lb. butter fat to gallon.

Take 8 gals. of 12% mix
8 lbs. to gal. finished
12%

.96 lb. butter fat to gallon.

Take 9 gals. 12% mix—for very heavy ice cream.
9 lbs. to gal. finished
12%

1.08 lbs. of butter fat to gallon.

The above shows conclusively that a statement or declaration of the *percentage* of butter fat does not inform as to the *amount* of butter that a purchaser receives in his plate, pint, quart or gallon. So the percentage requirement is useless to the public.

Not only do ice creams with the same *percentage* contain different *amounts* of butter fat, but ice creams containing *different percentages* of butter fat may have practically the *same amount* of fat in a measured quantity.

Using the same weights as above, take 5 gallons (50 lbs.) of 12 per cent mix to make 40 quarts of finished product, and the finished product will weigh 5 lbs. to the gallon and each gallon will contain .6 lb. of butter fat.

Take 6 gals. of 11% mix
6 lbs. to gal. finished
11%

.66 lb. butter fat to gallon.

Take 7 gals. of 10% mix
7 lbs. to gal. finished
10%

.70 lb. butter fat to gallon.

Take 8 gals. of 9% mix
8 lbs. to gal. finished
9%

.72 lb. butter fat to gallon.

Take 9 gals. of 8% mix
9 lbs. to gal. finished
8%

.72 lb. butter fat to gallon.

Or where 9 gallons of 6 per cent mix are used to make 40 quarts of finished product the amount of fat to the gallon (.54 lb.) is within six one-hundredths of a pound of the amount of fat in a gallon of one kind of 12 per cent ice cream that is legal ice cream under this statute.

From the above we see that (1) while the requirement of the statute is strict as to 12 per cent of the whole mass being butter fat, a constituent of one of the permissible ingredients and not itself an ingredient, the volume or quantity of butter fat may vary at least as much as 50 per cent in a given volume or measure of the product, and a purchaser relying upon the false assurance of the law and in no wise

exercising the vigilance and right of choice he had been wont to exercise might easily be deceived and defrauded and the offender go unwhipped of the law; and (2) standard ice cream—that is to say the only product that may be sold as ice cream under this act—may safely be represented to the purchaser as superior to all other products heretofore commonly known and sold as ice cream, whereas it is common knowledge that there are products heretofore lawfully salable as ice cream that are in both intrinsic value and food value superior to such ice cream as may be sold as ice cream under this act.

On the other hand it makes no difference where the fat point is fixed, it is always possible to make a legal mix illegal by adding ingredients that *improve* it, as when eggs are added, or when to produce heavy body in the finished product without increasing materially the *amount* of fat in a measured quantity, extra milk is added to a batch to make a given quantity. In other words if we take five gallons of any mix to make 40 quarts of ice cream that will pass as legal ice cream under this statute and add to that 5 gallons of mix four gallons of whole milk and still produce but 40 quarts of finished product, we increase the amount of butter fat in each gallon, but the percentage of fat is so reduced as to make the product illegal under this act.

Or if to make 40 quarts of French ice cream we take all the materials to make 8 gallons of 12 per cent mix and add to them anywhere from 80 to 120 eggs (approximately 8 to 12 pounds) *we make a product that is illegal under this act, though it contains besides the eggs much more fat to the gallon than is necessary in another kind of ice cream that would pass as legal.*

A reasonable basis must be found for this regulation if it is to stand. What is the basis of this butter fat regulation? We have shown it does not show the *amount* of butter fat present and is not a measure of the *amount* of cream used, and it is not a measure of the value of ice cream as a food

or a confection, for the other milk solids, not fat, and other materials used are of as great, if not greater, food value; not a measure of its intrinsic value, for the amount of butter fat may vary even though the percentage is fixed; or eggs or other costly ingredients may be added and reduce the percentage, so that butter fat is not a measure of the cost of producing the article. It is not even an ingredient of ice cream, but merely one of the constituents of milk, cream and condensed milk, any or all of which may enter into ice cream in varying proportions and amounts. Why twelve per cent. any more than ten, and why not fourteen instead of twelve? The answer is that there is no basis whatever, but it is purely arbitrary; and it is also unreasonable, for we find that many kinds of ice cream do not contain twelve per cent. and are not made solely from cream; and being arbitrary and unreasonable, is, therefore, void as denying the equal protection of the law. A man is deprived of the privilege of selling his ice cream unless it complies with this arbitrary standard.

Now, we find that not only is this arbitrary and unreasonable regulation made but that ice cream is divided into two arbitrary classes, one of which does not contain fruit or nuts used as flavoring, and the other of which contains fruit or nuts used for flavoring. If you use fruits or nuts for flavoring you get an allowance of two points. Is this a health provision, or does it tend to prevent fraud? Has it any basis? If twelve per cent of butter fat is absolutely necessary in any other kind of ice cream, why is it not necessary in a fruit or nut ice cream? If two points are allowed for the addition of either fruit or nuts, why should not four points be allowed if both fruit and nuts are added? If a man adds either fruit or nuts, no matter how small the amount, he gets an allowance of two points, which allowance is also purely arbitrary. A man would have to add twenty per cent. of fruit or nuts to his mix to entitle him to any such allowance, and such an amount is seldom,

if ever, added. If it is said that the addition of fruit or nuts increases the weight and thus lowers the percentage of buter fat, so does the addition of eggs, the addition of ground macaroons to make bisque ice cream and numerous other additions to the mix which add to the weight as do fruit and nuts, and yet no allowance is made for such additions.

This is a purely arbitrary classification of ice cream.

That the classification, such as that made in this statute, is unlawful, see case of People *ex rel.* Farrington vs. Mensching, 187 N. Y., 8, where it is said:

> "The classification must be such as in the nature of things suggests and furnishes a reason and justifies the making of the class. The reason must inhere in the subject matter, and must be natural and not artificial. Neither mere isolation nor arbitrary selection is proper classification (G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150; Cotting vs. K. C. S. Co., 183 U. S., 79; Connolly vs. U. S. P. Co., 184 U. S., 540; Matter of Fell, 171 N. Y., 48; People vs. O. C. R. C. Co., 175 N. Y., 84; Ruhstrat vs. People, 185 Ill., 189; People *ex rel.* McPike vs. Van De Carr, 91 App. Div., 20; 178 N. Y., 425; Wright vs. Hart, 182 N. Y., 330; People vs. Beattie, 96 App. Div., 393; People *ex rel.* Appel vs. Zimmerman, 102 App. Div., 103)."

It was held in Nichols vs. Amos, 173 U. S., 509, 521, that:

> "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. Gulf, Colorado, etc., Railroad vs. Ellis, 165 U. S., 150, 155; Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 294."

Further, it discriminates between dealers who manufacture ice cream without using fruit or nuts for flavoring and those who do use fruit or nuts for flavoring, thereby denying the

former the equal protection of the law. All recent United States Supreme Court decisions on this point are reviewed in State ex. Mikisek, 125 S. W., 503.

Point V.

The act in question does not tend to prevent fraud.

The basis of the claim of the State is solely that the act is sustainable as tending to promote the general welfare, in that it tends to prevent fraud and deceit. That is, that it tends to prevent the sale for and as ice cream of what is not in fact ice cream. The decision of the Iowa court is based entirely on that proposition. The Iowa court in their opinion say:

> "It is not claimed on either side, as we understand it, that the act in question is a health law. The claim of the State is that the purpose of the legislature was to prevent the perpetration of fraud upon the public" (Record, p. 13, lines 9-12).

It follows that if the act does not tend to prevent fraud it cannot be sustained, because the only ground on which it can stand fails.

The question, then, is, Does the statute tend to prevent fraud and deceit? As illustrating the reasoning applicable to this proposition, the oleomargarine cases, which are numerous, are somewhat illuminating. In the case of People ex. Freeman, 242 Ill., 373 (90 N. W., 502), the Illinois court state:

> "It is argued that it is an unjust and unlawful discrimination, which the legislature has no power to make, to prohibit the use of harmless coloring matter in oleomargarine, and at the same time permit its use in butter, the product of pure milk and cream, under the pretense that it is for the prevention of the

> public health. In this counsel mistake the purpose of the act. Aside from any effect upon the public health, the object of the act is not to prohibit or discriminate against the manufacture or sale of substitutes for butter, but to regulate such manufacture and sale as to protect the public against the sale, as butter, of a different article. With the sale, for what it is, of any substitute for butter, the law does not interfere. It is only the sale under pretense that the article sold is that which it is not that the law affects. Stat in People ex. Marx, 99 N. Y., 377; 52 Am. Rep., 34; 2 N. E., 20, reversing 35 Hun., 529, a statute prohibiting not the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese, was held void chiefly because it was construed to be an attempt on the part of the legislature to drive the manufactured article from the market, for the benefit of another industry, and to protect those engaged in the manufacture of dairy products against the competition of cheaper substitutes, capable of being applied to the same use; in other words, that the object of the statute was to prohibit one industry in order to foster another."

The oleomargarine cases have universally been based on the thought as above variously expressed, i. e., the question of substitution or imitation, the protection of the public against the liability to fraud or deceit, that is, the sale for butter of what is not butter in fact.

The most important of the oleomargarine cases are reviewed in the case of Schollenberger ex. Penn., 171 U. S., 1, and State ex. Hannon, 130 N. W., 412.

The limit to which any oleo case can be carried is that the legislature may prevent the sale of the substitute for a well-known article of food. Here such a principle has no application, for here the sale is not of a substitute for an article, but of the article itself.

This is well stated in State ex. Layton, 61 So. W. Rep.,

171, where the court, referring to oleomargarine cases, says, at page 176:

> "But the question raised on this record, while a kindred one, is, we conceive, different. It seems to us that, in the nature of things, there is a wide difference between legislation prohibiting or regulating the manufacture with a design to imitate a standard or superior article, and pass it off on the public, which cannot readily detect the imposition, for something different from what it is, and the manufacture and sale of an article which in truth and fact is admitted to be innocuous and healthful and in general use, and about which there is neither secrecy, nor imitation of another article of conceded purity and wholesomeness."

No case can be found that will sustain the contention that under the police power a legislature may forbid the sale of a wholesome product under its own name. The cases are all to the contrary. The most recent is State vs. Hanson, 136 N. W., 412, which holds flatly that a State cannot prohibit the manufacture and sale of a wholesome article of food.

The Marx case (People vs. Marx, 99 N. Y., 384) declared the New York oleomargarine act unconstitutional on the ground that it prohibited not the manufacture of an "imitation" of dairy butter, but of an article to "take the place of butter" (see pp. 383, 384). This case holds that the State cannot forbid the sale of a wholesome article of food under its own name and points out the danger of any such doctrine (p. 387). The court would not listen long to an argument to the effect that an act of legislature could prevent the sale of bread or cake, or that candy could not be sold unless it contained a certain amount of sugar, or was of a certain degree of sweetness; that sponge cake could not be sold unless a certain amount of flour were used for every pound of cake made.

It is also important to remember that if arbitrary regulations, such as that in question, are to be upheld the legisla-

ture may change them from time to time, so that 2 per cent ice cream may be "legal" under one set of regulations, while the next session might make 16 the required percentage. Either would have as much but no more basis than the present arbitrary 12 per cent.

It seems indisputable that in order to apply to the present case the theory of the oleomargarine cases it must be said that the purpose of the statute is to prevent the sale *for* ice cream of what in fact is *not* ice cream. Right here is the distinction. Does the statute have a tendency to prevent the substitution for ice cream of what is not ice cream?

What is ice cream? The State will say the statute on which this prosecution is based defines ice cream as "a frozen product from pure sweet cream containing not less than twelve per cent butter fat." We say that is a correct definition of but one kind of ice cream. It will be recollected that ice cream is not a natural product, but an artificial product, a combination of various substances, and that a correct definition thereof involves a correct apprehension of at least the common understanding of what is meant by the term "ice cream" as generally used. Can a legislative fiat make that true which as a matter of fact is not true? Suppose the legislature should attempt to define cake and say that cake was a mixture of flour and sugar and eggs and butter, containing a certain amount of flour, and not less than a certain percentage, by weight, of eggs, and providing that any person selling or having for sale cake not according to the standard should be guilty of a misdemeanor, and punished accordingly, on the theory that every purchaser of cake has a right to assume that cake is a certain kind of cake and that the dealer can lawfully deliver only that certain kind of cake. Defendant on such a proposition would say, "What is cake?" and the State would calmly point to the statutory definition and say "That is cake, because the statute has so defined it," regardless of the fact that cake is made in a thousand dif-

ferent ways, with ingredients in a thousand different proportions. The same might be true of soup, puddings or a hundred other compounded foods. We submit that legislative fiat cannot make that black which is white or white which is black; that the per cent of butter fat is not anywhere in the public mind a test of what is or what is not ice cream.

Judge McHenry in his opinion in the District Court of Iowa, in which he held the act in question unconstitutional, so held saying:

> "If the legislature of Iowa can prescribe that ice cream shall contain 12 per cent of butter fat and prevent the sale of it without that ingredient they may equally provide that no baker shall sell cake unless it contains 20 per cent by actual weight of pure eggs to the pound of cake. They may also provide that no hotel keeper shall serve soup to his customers without 6 per cent of animal fat therein, and both the manufacturer and the purchaser would be bound by this act of the legislative body.
>
> "A further discussion of this question which is so plainly and unequivocally beyond the power of the legislative body would be useless."
>
> (Rec., pg. 6.)

Ice cream is eaten primarily as a luxury rather than a food. As a matter of fact, the preference or choice of the consumer rests more upon sweetness, richness and sugar and flavor than upon fat content or upon solid content; in other words, upon taste rather than upon exact knowledge of the percentage of one or more of the constituents.

We again quote from the opinion of Judge McHenry:

> "Ice cream is not a natural food product, but a manufactured combination of other ingredients. To one man ice cream containing 12 per cent of butter fat might be beneficial and acceptable to his taste. To another man ice cream containing but 6 per cent of butter fat might be more suitable, and in both cases

> it is a matter of common knowledge that it is a harmless food product not injurious to public health, morals and welfare. The State of Iowa might as well have said in defining ice cream that it shall have 10 per cent of actual weight of sugar."
>
> (Record, pg. 6.)

When the court below points to the statutory definition contained in the very statute under which we are prosecuted, as establishing what ice cream is, the court is reasoning in a circle. The fact that the absurdity of requiring that ice cream as a product shall be true to a name that is hardly more definite than "soup," and certainly no more definite than "vegetable soup" or "cream" soup is indicated by the fact that different States have attempted to set up different standards. The State cites this as tending to show that the standard fixed is reasonable. What we claim is, that it shows that there is no commercial or natural standard whatever; that the purchaser when he buys ice cream has no reasonable right to assume that it contains any particular amount of butter fat where no representation as to butter fat content has been made by the dealer and no specification as to butter fat has been made by the purchaser. The attempt to claim that he has a right so to assume because the statute in question so fixed is like the argument referred to in the Wisconsin case, State *vs.* Redman, 114 N. W., 137 (14 L. R. A. (n s.), 234), as to reasonableness: "If it were true that all police regulations are legitimate which are reasonable and all are reasonable which the legislature so wills, the Constitution as to very much of the field of civil government would be of no use whatever." That sort of arguing is not reasoning, but simply assertion. The legitimate reasoning is this: If this statute is to be sustained on the theory of prevention of fraud or deceit, it must be because there is actually an imaginable liability to be deceived. The only imaginable possibility of deceit is that the purchaser might be imagined or assumed to have right to infer or ex-

pect, aside from the statute in controvery, that the name "ice cream" carries with it the assurance to the public mind of some particular percentage or amount of butter fat content. If not, there can be no possibility of deceit and the statute must fail. Now this, we say, is a question of fact which the court must determine. Not so, says the counsel for defendant in error, because the statute has saved you the trouble by defining it as "the frozen product made from pure wholesome sweet cream and sugar with or without flavoring and if desired the addition of not to exceed one per cent by weight of a harmless thickener and contains not less than twelve per cent by weight of milk fat and the acidity shall not exceed three-tenths of one per cent."

The whole case of the State *must* rest, we think, on this proposition: the State, by adopting as a test of ice cream that which was never before known in the trade and to the common understanding as such, has thus established as a fact that ice cream of a less butter fat content which before the enactment of the statute was known as ice cream and was ice cream, is now no longer ice cream in fact, and cannot be sold as ice cream, because such sale would tend to deceive and defraud the purchaser, who had a right to assume that he was getting the statutory article. The argument necessarily is that before the enactment of the statue such a sale would not be liable to deceive, because the purchaser would have no right to assume that the term "ice cream" implied 12 per cent or any other certain per cent of milk fat, but that after the enactment of the statute he would so infer. In other words, the statute itself creates the very possibility of deceit which it is intended to guard against.

To such an absurdity does the logic of the State inevitably lead. That is, before the enactment of the statute no possibility of deceit existed, because no purchaser had a right to infer that the term "ice cream" imported any specific proportion of milk fat. Hence no occasion existed for the protection of the public against an evil which could not occur. The

State, assuming the very point in controversy, seeks to sustain this statute as one enacted solely to prevent the possibility of deceit. Then, necessarily admitting (if our proposition of fact is true, *i. e.*, that the term "ice cream" had never imported any specific per cent of milk fat or that the product is made only of dairy cream), that no possibility of deceit previously existed, it contends that the possibility of deceit does *now* exist because it has been created by the very statute in controversy. This position not only begs the very question in controversy, but seeks to sustain the statute upon a ground which did not exist.

The oleomargarine cases are not parallel. The oleomargarine statutes were sustained as preventing the possibility of deceit by the sale of oleomargarine *as* and *for* butter. But this possibility of deceit necessarily had existed before the enactment of the statute, since natural butter was a well-known and well-established article of trade and the oleomargarine manufacturer evidently *might* impose on the public by selling oleomargarine, an imitation of or a substitute for butter, as and for butter. The evil to be provided against existed *before* the oleomargarine statutes were enacted and was not, as in the *instant* case, created by the statute itself. There was no question of identity of name or of substance between butter and oleomargarine and no attempt to exclude from classification as butter what had previously been known as butter. The oleomargarine statutes treated of a condition actually existing and did not attempt to create the very condition against which the legislation was presumably directed. The distinction is clear. A statute enacted under the police power must be sustained, if at all, by a condition really existing before the law was enacted and not by a condition created by the law.

Another class of cases which have been cited are the milk-standard cases.

The milk-standard cases are not in point, for we find that milk has been standardized because it is a natural product,

the adulteration of which is such a simple matter. Milk has always been composed of the same constituents, though in different breeds and different animals of the same breed the proportion of these constituents may vary to some extent. Notwithstanding the known fact of this variation in the milk of different cows—not a variation in the kind and number of constituents but in their relative proportions—it was deemed necessary, milk being among the necessities of life, to standardize milk, as a health measure, and to prevent fraud in a common necessity of life; in other words, to prevent the adulteration of a natural product. This distinction is clearly pointed out in Rigbers *vs.* City of Atlanta, 66 So. Eastern, 991, where the court contrasts milk with ice cream. Ice cream is not a natural product; it is a manufactured product, a complex compound without well-defined limits as to the variety or number of ingredients and without fixed proportions for such ingredients as may be used. On the other hand, milk, as has been pointed out, always has the same kind and number of constituents, the amount of which—not of one but of all—have been fixed for legal milk by standards based on the fair average of thousands of tests.

This question of milk standards and the oleomargarine cases is considered in the case of People *vs.* Biesecker, 169 N. Y., 53, where at page 57, Chief Justice Cullen says, after considering the cases:

> "From these cases the following propositions may be deduced: 1. That the Legislature cannot forbid or wholly prevent the sale of a wholesome article of food. 2. That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers is valid. 3. That in the interest of public health the Legislature may declare articles of food not complying with a specified standard, unwholesome and forbid their sale. Though these principles, like most legal principles, are true only within limits,

there would not seem much chance of conflict in their practical application, except between the first and last. In the first of the milk cases (People *vs.* Cipperly, 101 N. Y., 634, decided upon opinion of Learner, P. J., in 37 Hun., 319) it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was in fact unadulterated and not unwholesome. The first oleomargarine case can be differentiated from this on the ground that the statute forbade its sale as a substitute to take the place of butter and not as an unwholesome article of food. Still, that distinction is narrow and I imagine that the sale and consumption of a well-known article of food or a product conclusively shown to be wholesome, could not be forbidden by the Legislature even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge, is good and wholesome."

The case of State *vs.* Snow, 81 Iowa, 642, referred to by the court below as being "closely in point" (p. 18, Rec.), is, we respectfully submit, not in point at all.

This case involved a labelling question—it dealt with *imitations* of, or *substitutes* for, lard, and not with fats in general. The Legislature has not the power to define *fat* as *lard*, and to make it a misdemeanor to sell as fat any other fat than pure lard. In the common knowledge there are many kinds of fat suitable to be used as food besides lard. So there is common knowledge that there are many kinds of wholesome ice cream besides the particular kind described in the statute. In the Snow case the statute provided that *imitations* of lard must be appropriately labeled;

the statute in question forbids the sale of a product under its own name unless it is made in a certain way, regardless of what label is placed thereon.

In the Snow case the court pointed out that there was a difference between a case (such as this ice cream case) where the sale of an article under its own name is forbidden and a case (Snow case) where such sale is not forbidden, but the act merely required a label so that the public might know that they were getting not lard, as defined by the dictionaries, but an imitation of or substitute for lard. On this ground the Lard act was held constitutional. Our case, however, comes within the doctrine of People *vs.* Marx, 99 N. Y., 377, cited with approval in the Snow case. It cannot be held that one ice cream made by a formula that has been in use for many years and is ice cream within the definitions of the dictionaries and within common knowledge is an *imitation* of or *substitute* for another ice cream, and for this reason the doctrine of the Snow case does not and cannot apply.

Another case cited by the State is Schmidinger *vs.* Chicago, 226 U. S., 578. This was a weight and measure case. We do not contend that when we sell a pint or a quart of ice cream it does not have to be a full pint or full quart. We agree with the State that honest weights and measures are desirable and that laws requiring such honest weights and measures are within the police power. The Schmidinger case merely holds that an ordinance standardizing the weight of loaves of bread and providing for proper labels, is constitutional.

The ordinance considered in the Schmidinger case, did not attempt to define "bread," but merely regulated the weight of loaves of *any and every kind of bread.* It did not require that bread should be of a certain quality, or that it should contain a certain percentage of wheat flour or any other ingredient or constituent or that the name "bread" should apply only to wheaten bread and that rye or graham bread should not thereafter be sold as bread. If it had done

this, then the case would have been in point, but then the ordinance would unquestionably have been held unconstitutional.

Our reasoning above is evidently based upon the proposition that as a matter of fact and common knowledge, previous to the enactment of the statute in controversy at least, the term ice cream did not to the common understanding and in the common and usual acceptation of the term import any specific proportion of milk fat. We have discussed this particular question as to what ice cream is and what the term imports to the common understanding and in the common and usual understanding of the term under the heads of Points III and IV above. Our position is that ice cream is a generic term applied to an admittedly wholesome product which has been sold under its own name for a hundred years and that since the name has never imported any specific amount of butter fat content its sale under its own name could not in the nature of things tend to promote fraud as to said butter fat content. This, of course, involves a question of fact which the court must determine.

Professor Freund, of the Chicago University, a well-known text-book writer on "Police Power," in an article entitled "Problems of Police Power," in the October, 1913, number of Case and Comment, page 304, speaking of the difficulty of classifications of this sort by courts remarks:

> "The reason for this failure is tolerably clear. The legitimacy or illigitimacy of classification can be established only on the basis of social or economic data of great complexity. It presents a question of fact for the examination of which the courts are not equipped. It is always a condition as well as a theory which underlies public welfare legislation; and while the courts can deal adequately with the theory, the condition must elude them unless it is notorious, and at present the causes of social or economic grievances are rarely notorious."

This author recommends the superior efficiency of commissions in the determination of questions of fact of this sort. The difficulty is perhaps enhanced in a case like the one at bar by the fact that in the investigation of conditions governing a great industry of recent development, like the ice cream business, sufficient time has not elapsed for the production of standard text books on the subject to which the court could conveniently refer for a determination of the facts of general knowledge on the subject; but the information from which judicial notice must be derived is chiefly contained as yet in technical magazines, lectures, and the expressions of those whose experince enables them to speak with authority.

How a superficial glance at some of the so-called authorities submitted by the State may mislead a court is shown by the fact that the court below discusses three formulas which are taken from a muck-raking magazine and refer to "the man" and other indefinite persons as authority. In all of these formulas costs are set down for materials only; but the court seems to have accepted the figures as the total cost of manufacturing the several kinds of ice cream. If in each case a reasonable cost of thirty cents a gallon is added for manufacture, selling, etc., the difference in price does not seem as great and it is a fact that the cost per gallon of manufacturing and handling would be about the same in each of the three cases. Moreover, the formulas are all faked.

Formula No. 1 contains 19.5 per cent butter fat, not 20 per cent. It contains 4.14 per cent of milk solids not fat, 9 pounds of sugar and 9.96 pounds of milk fat; a total of 23.10 pounds total solids, or 45.2 per cent solids. It certainly would be exceptional to find an ice cream containing even 40 per cent total solids, and it is highly improbable that ice cream containing 45.2 per cent total solids has ever been made, commercially or otherwise.

Formula No. 2 contains 7.94 per cent butter fat, instead of 7½ per cent. It contains 4.79 pounds milk solids not fat, 7.5 pounds of sugar, .25 pounds of gelatine and 4.04

pounds of milk fat; making a total of 16.50 pounds total solids, which is 22.6 per cent of total solids. While the first formula has never been made, the second formula is low, both as to fat and as to solids not fat, as compared with the great bulk of commercial ice cream, which runs about 35 per cent total solids.

Formula No. 3 is an absolute fake. It contains 1.31 per cent milk fat, 27.10 pounds milk solids not fat, 4 pounds of gelatine, 60 pounds of sugar, 9.83 pounds of milk fat; a total of 100.93 pounds total solids, equal to 11.49 per cent of total solids. No such formula was ever used commercially, as the product would be an extremely poor grade of hokey pokey, so poor, in fact, as to be unsalable as hokey pokey. It is a faked up formula intended to show something that *might* be called ice cream. Fully 40 gallons of water would have to be left out to make a product with body enough and sweet enough to be salable as a rather poor hokey pokey. The flavor at the price figures necessarily would be a cheap imitation flavor and it would be practically impossible to expand this mixture to 120 gallons; the most that could possibly be gotten with a rapidly driven freezer would be about 80 gallons instead of 120.

The court below seems to have leaned heavily on these alleged formulas for ice cream as pointing to the necessity for employing the police power of the State to prevent the sale of cheap ice cream as and for a more costly and possibly better ice cream. To do this the court below assumed that all ice cream—regardless of kind or quality—is or might be sold at the same price, whereas as a matter of fact the price of ice cream, as of all other products, is controlled by competition, and the price at which ice cream sells varies as widely as do the variation of the product. It is true that one manufacturer may be selling an ice cream containing less butter fat than that of another manufacturer, either at the same or even a higher price. But this does not necessarily or even probably involve misrepresentation. There

are many factors other than low cost or value of materials that influence, and properly, a manufacturer in fixing his price, and even the materials might cost one manufacturer considerably more or less than they cost another manufacturer for the same volume of ice cream containing the same percentage of butter fat. Considering all these factors to be equal in all cases—a most violent assumption—it still cannot be held that it is a fraud for one manufacturer to demand and to receive a higher price for his product than another manufacturer demands and receives, nor is it a fraud for a manufacturer to demand and receive for his less costly product as high a price as another manufacturer gets for his more costly product, so long as he makes no misrepresentation as to the quality of his product or as to any of his reasons for demanding his price.

We purchase candy for $1.00 per pound; are we defrauded because we can purchase candy containing the same or even more and better materials for sixty cents per pound? Or take but one kind of candy—chocolate creams. A manufacturer may use a high-priced chocolate coating and his cream may contain 90 per cent or more of sugar, and yet his product may not bring him as high a price as that received by a manufacturer who uses a lower-priced coating and no more than 50 per cent of sugar in his cream. Is this an argument for preventing the sale, for and as "chocolate creams," of products containing less than 60 per cent of sugar? Yet it is the argument of the State—the argument which seems to have impressed the court below.

We repeat: the price for which the product sells is immaterial, is not an argument, unless the quality and price of all ingredients, the cost of materials, the cost of sales, are all fixed by statute, together with the sale price of the product. No such situation is here presented.

This court can determine as a fact just what the term "ice cream" means and how it is commonly used. In so doing it

can take judicial notice of "all those matters and things which are of common knowledge and understanding."
(Opinion Judge McHenry, Record, pg. 5.)

This court has already taken judicial notice of the ordinary operation of an ice cream freezer (Brown *vs.* Piper, 91 U. S., 37).

This court in the recent case of Muller *vs.* State of Oregon, 208 U. S., 412, discussing the question of the judicial cognizance of the court and methods of acquiring knowledge on that subject, said:

> "In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss in the present case, before examining the constitutional question to notice the course of legislation *as well as expressions of opinion from other than judicial sources.* In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin. * * * The legislation and opinions referred to in the margin may not be technically speaking authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is *affected by the truth in respect to that fact,* a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

In that case the Supreme Court appends to the opinion a foot note containing a list of miscellaneous publications on the subject, giving information on the subject under discussion.

Not to repeat what we have already said under Point III as to the true meaning of the term "ice cream" we feel that we have demonstrated that from the beginning, and always, ice cream has been made from all sorts of varying mixtures and combinations to suit the taste of the consumer, and in no case has the proportional content of butter fat been regarded as a test of the appropriateness of the application of the term "ice cream" as a name for the product.

In brief our argument is that this enactment if sustained, must be sustained solely as tending to prevent fraud and deceit; that if so sustained, it must be sustained on the basis of the real *situation as it existed before the enactment of the statute,* and not on the basis of a situation created by the statute itself, and that since the incontrovertible facts of common knowledge on this subject absolutely negative the possibility that any purchaser of ice cream could have been misled by the term "ice cream" into assuming that the name implied any particular proportionate butter-fat content, or that the product was made of dairy cream alone, it necessarily follows that no fraud was possible and hence the law cannot be sustained as a police measure tending to prevent fraud and deceit.

Point VI.

If a standard for ice cream could be enacted under the police power nevertheless the sale of ice cream as ice cream which did not conform to such standard could not under the police power be absolutely prohibited.

The act as construed by the Iowa Supreme Court absolutely prohibits the sale of the "product heretofore known as ice cream" as ice cream. This is in effect an absolute prohibition of its sale.

The Iowa court missed the point made by the Georgia court in the Rigbers case. In the Rigbers case the court pointed out that while it might be possible to enact a "Standard Ice Cream"—to say that products sold as such standard ice cream should be of certain ingredients and quality—it could not prevent the sale of *ice cream as ice cream* provided it was properly labeled. In other words the State might enact a standard for a product and require all other products sold under the same name but varying from the standard to be labeled. (Heath & Milligan Co. *vs.* Worst. 207 U. S. 338).

Here the ice cream manufacturer cannot sell his ice cream as ice cream *even if he puts a label on it stating all the ingredients used and the amount of each ingredient and the resultant amount of butter fat therein.*

In the Coppage *vs.* Kansas case it is said:

> "But, in our opinion, the 14th Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting *so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare.* The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment." (Italics ours.)

We think it is significant that Mr. Justice McKenna, in the Heath & Milligan Co. *vs.* Worst case, closed his opinion with these words:

> "*And it must be borne in mind* that the use of the *non-enumerated ingredients* is not forbidden nor the advantages of the *practical tests* and scientific research made by appellants taken away *from them.* The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition." (Italics ours.)

We submit that this legislation having no relation to the public health or public welfare—enacted solely because of the mistaken notion that it would, by compelling ice cream manufacturers to use cream only, make a market and secure a high price to the farmer for that product, whereas in reality it would destroy the market for ice cream and thus injure the farmer—has gone beyond mere regulation which is the limit to which the police power extends even if we assume that the sale of ice cream could be regulated by a statute requiring labeling as to ingredients.

The business of manufacturing ice cream is a useful occupation not affected with any public interest and can only be regulated by virtue of the police power and then can only be reasonably regulated. Murphy *vs.* California, 225 U. S. 623.

The power to regulate industry for the public good was never intended to be used to restrain and destroy a lawful business. The legislature may not restrict or prohibit traffic in wholesome food products under the mere pretense of regulating it. The court will look, as it said in the Lochner case, at the real motive for which the statute is passed as well as considering the real effect of the statute as enacted, and where, as here, there is no reasonably apparent need for regulation for the public good, and where,

as here, the act has gone beyond regulation, beyond what would be reasonably designed to prevent the sale of one product for another or to prevent misrepresentations in regard to the nature of a product, the court should, we submit, protect the interests of the industry affected by declaring the act in question unconstitutional.

Lastly.

We submit that the decree of the Supreme Court of the State of Iowa must be reversed.

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